(21,379.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1910.

## No. 84.

HENRY SCHODDE, PETITIONER,

*vs.*

TWIN FALLS LAND AND WATER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 1380.

United States Circuit Court of Appeals for the Ninth Circuit.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant in Error.

*Transcript of Record.*

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

1 In the District Court of the Fourth Judicial District of Idaho in and for Lincoln County.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Complaint.*

The plaintiff complains, and alleges for a first cause of action:

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah.

II.

That plaintiff is now, and has been for more than ten years last past, the owner in the possession and entitled to the possession of those certain lands situate in Lincoln County, State of Idaho, and being lots two (2) and three (3) of section fifteen (15), and lots numbered one (1) and two (2) of section sixteen (16) in township ten (10) south, of range twenty-two (22) east, Boise Meridian, and being 161.30 acres in area.

2 III.

That said land is agricultural land, arid in character, and requires the artificial application of water thereon before crops can be successfully or profitably raised thereon.

IV.

That said lands lie on the south side of that certain stream flowing through the State of Idaho in a westerly direction and known as Snake River, and are contiguous to said river.

V.

That the only available water supply for use upon said lands is the flow of the waters of said Snake River.

VI.

That the flow of the waters of said Snake River where the westerly portion of said tract of land fronts thereon, and immediately below and westerly from said tract of land, is naturally rapid, and the flow of the waters of said river at said point when confined to or near the southerly side of said river, before the action of the defendant hereinafter stated, was of such velocity as to be available for power purposes.

VII.

That on or about the 18th day of August, 1895, the plaintiff appropriated fifty second feet of the flow of the waters of said Snake river for use upon his said land, and did as soon as practicable
3 after making said appropriation, and at a cost to plaintiff therefor of more than sixty-two — ($6,200) dollars, build and erect three water-wheels in said Snake River near the south bank thereof and westerly from said lands of plaintiff, and upon the legal subdivision immediately joining said lands on the west, two of said wheels being thirty feet in height, and the other of said wheels being thirty-four feet in height, and constructed two wing dams in said river, each of said wing dams being more than two hundred feet in length and so built and constructed as to confine the flow of the waters of said river to the southerly bank thereof, and to raise said water three feet or thereabouts above the natural height of the waters of said river directly above said water-wheels and each of them, and thus caused said wheels and each of them to revolve, and by means of buckets fastened thereon, to lift water to the extent of five second feet and empty the same into flumes adjoining said wheels, and said water by means of said flumes was carried in said flumes a distance of about six hundred feet from said wheels to ditches constructed by plaintiff and carried to and over his lands, and used thereon to irrigate and cultivate the same. That all of said land was and is covered by said ditches and can be irrigated therefrom, and that said ditches and said flumes were and are of sufficient size and carrying
4 capacity, to carry said amount of water, and that said water in said amount is necessary for the successful cultivation and irrigation of said land.

VIII.

That the plaintiff has continuously and during the irrigating season of each year from and after said appropriation of said water as aforesaid, used said water in said amount upon said land for the irrigation and cultivation thereof, and lifted, conveyed and distributed said water to and upon said lands by means of said wing dams, water-wheels, flumes and ditches, and raised crops thereon of hay, grain and vegetables, and made pasture of said lands in the fall and winter months of each year; the value of the crops raised on said lands each

year, including the value of the pasture, being the sum of thirty-five hundred to four thousand dollars.

IX.

That in the year 1903, and while the plaintiff was using said water as aforesaid, the defendant commenced the construction of a dam across said Snake River at a point about nine miles westerly from and below the said lands of plaintiff and near the town of Milner, situate in Cassia County, Idaho. That work from that on was prosecuted on said dam until the completion thereof on or about March 1, 1905. That said dam is so constructed as to impound all the waters of Snake River flowing at said point, and to raise
5 said water forty feet in height. That on numerous occasions during the time said dam was in progress of construction the plaintiff inquired at his said lands, and at said town of Milner, of the officers and agents of the defendant in regard to the effect the building of said dam and the filling thereof with water, as contemplated by defendant, would have on the said lands and said water-wheels of plaintiff, and was on each of said occasions told by said officers and agents that the construction and use of said dam would in no wise interfere with plaintiff's lands or water supply, and would not work him any injury or damage whatsoever; and that having confidence in said persons and believing their said statements, the plaintiff made no effort to prevent the construction of said dam.

X.

That on said 1st day of March, 1905, defendant closed down the opening of said dam and filled said dam with water in order thereby that a canal extending therefrom and owned by defendant, and situate on the north side of said Snake River and carrying the waters of said river to lands below said dam for irrigating purposes, might be filled with said water; that by reason of said closing down as aforesaid of said dam the waters of said Snake River backed up from said dam up said river to and beyond the place in said river wherein are situated said water-wheels belonging to plaintiff, and said
6 current in said river by means of which plaintiff was enabled to turn his said water-wheels and raise his said water was destroyed, and it became impossible for said wheels to turn or to furnish any water whatsoever for use upon said lands, and it is now impossible, and will so continue in future, for plaintiff to so arrange or change said dams or water-wheels, or flumes, or to build or construct other dams, or water-wheels or flumes that will raise any water whatever from said stream that can be used upon plaintiff's said lands, and that by reason thereof plaintiff has not been able to irrigate said lands, or any part thereof, or to raise profitable crops thereon, or to use the same as pasture lands, and will not in the future be able to irrigate said lands or raise profitable crops, or any crops at all thereon as long as said dam of defendant is maintained.

XI.

That defendant's said dam was constructed for the purpose of raising the water into said hereinbefore-mentioned canal, generally

known as the Twin Falls Canal, of defendant, and that said canal was constructed at a cost, as plaintiff is informed and believes, of about $1,500,000, for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300 acres of arable and arid land situate thereunder, and that for said lands and for
7 a great number of people, being as plaintiff is informed and believes, five thousand in number; there is no other water supply available for irrigation, stock, domestic or manufacturing purposes except the waters from said canal. That said dam must therefore be filled with the waters of said Snake River and run into said canal, or said section of country depending upon said canal for water as aforesaid would become uninhabitable, and that therefore the condition of said Snake River at the points where are situate said water-wheels and wing dams of plaintiff will continue in the future, as they now are, and as they have been since said 1st day of March, 1905, and said current of said river will not turn said water-wheels, or enable them to supply said lands of plaintiff with water.

XII.

That there is no other supply of water available for use upon said lands of plaintiff except waters from said Snake River raised as aforesaid by said water-wheels.

XIII.

That by reason of said backing up of said water and stopping plaintiff from using said water-wheels to raise the waters of said Snake River to and upon his said lands, and cutting off the water supply from plaintiff's said lands, plaintiff has been damaged
8 in the sum of twenty-four thousand one hundred fifty ($24,150.00) dollars.

That about twelve acres of said land of plaintiff *has* been covered by the waters of said Snake River backed up as aforesaid by said dam of defendants, and will continue to be covered and will be absolutely lost and destroyed, to plaintiff's further damage in the sum of twenty-four — ($2,400) dollars.

XIV.

That defendant has not paid said sum, or any part thereof.

And for a second cause of action plaintiff alleges:

1. That defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah.

2. That plaintiff is now, and himself and his predecessors in interest have been since the year 1889, the owners and in the possession and entitled to the possession of those certain placer mining claims situate in sections 16, 17, 19 and 20, in township 10 south, range 22 east, Boise Meridian, and being 102.66 acres in area, and described in the patent from the United States therefor as Lot 1286, and known as the Howard, Lee and Ernest placer mining claims. That said land is both mining and agricultural land, and that said land is arid in character, and requires the artificial application of water thereon

before crops can be successfully or profitably raised thereon.
9 That said land lies on the south side of that certain stream flowing through the State of Idaho in a westerly direction and known as Snake River.

3. That the only available water supply for use upon said land either for agricultural or for mining purposes, is the flow of the waters of said Snake River.

4. That the flow of the waters of said Snake River where the westerly portion of said tract of land fronts thereon, and immediately above and westerly from said tract of land, is naturally rapid, and the flow of the waters of said river at said point when confined to or near the southerly side of said river was of such velocity as to be available for power purposes.

5. That in the year 1889, the predecessors of the plaintiff appropriated six hundred miner's inches measured under a four-inch pressure of the flow of the waters of said Snake River for use upon said land for mining purposes, and did as soon as possible after making said appropriation, and at a cost of $11,500.00, build and erect six water-wheels in said Snake River near the south bank thereof, and adjoining the said lands of plaintiff, each of said wheels being 24 feet in height, and constructed a wing dam in said river more than 200 feet in length, and so built and constructed as to confine the flow of the waters of said river to the southerly bank thereof,
10 and to raise said water three feet or thereabouts above the natural height of the waters of said river directly above said water-wheels and each of them, and thus caused said wheels and each of them to revolve and by means of buckets fastened thereon to lift water to the extent of six hundred inches, miner's measurement, measured under a four-inch pressure, and empty the same into flumes adjoining said wheels, and said water, by means of said flumes, was carried in said flumes and ditches a distance of about five hundred feet from said wheels to ditches constructed by plaintiff and his predecessors in interest, and carried to and over his lands, and used thereon to irrigate and cultivate the same, and for mining purposes thereon. That said ditches and flumes are of sufficient size and carrying capacity to carry said amount of water, and that said amount of water is necessary for the successful mining of said ground, and 200 inches of said amount *is* necessary for the successful irrigation and cultivation of said land.

6. That plaintiff has continuously during the five years last past used said water in said amount of 200 inches upon his said land for the irrigation and cultivation thereof, and that plaintiff and his predecessors in interest have continuously and during the mining season of each year used said water in said amount of 600
11 inches upon said land for the purpose of mining that portion of said land adjoining the said Snake River. That eight acres or thereabouts of said land *has* been used for agricultural purposes, and *is* valuable in the main for agricultural purposes, and that the remainder of said land being between 22 and 23 acres in extent, is agricultural land equal in value to the remainder of the land, but is more valuable for mining than for agricultural purposes. That said land cannot be mined upon, or the gold contained

thereon cannot be extracted without the use of the waters of said Snake River thereon, and that in order to successfully mine upon said land, or extract the gold or other precious metals therefrom, it is necessary that the water in said Snake River be at a low stage, and that the backing up of the water hereinafter mentioned by reason of the hereinafter-mentioned dam of the defendant, prevents, and will continue to prevent, said land or any part thereof from being used for mining purposes, or being mined at all.

7. Plaintiff repeats subdivisions IX, X, XI and XII of the first cause of action herein, and makes the said subdivision, and each and the whole thereof, a part of this his second cause of action herein.

8. That by reason of the backing up of said water and stopping plaintiff from using said water-wheels to raise the water of
12 said Snake River to and upon his said lands, and cutting off the water supply from plaintiff's said lands, and preventing plaintiff from raising crops thereon or mining thereon, plaintiff has been damaged in the sum of $20,000.

9. That defendant has not paid said sum, or any part thereof.

And for a third cause of action herein plaintiff alleges:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Utah.

2. That plaintiff is now, and he and his predecessors in interest have been for more than thirteen years last past, the owners and in the possession and entitled to the possession of those certain lands situate in Cassia County, State of Idaho, and being the northeast quarter of the northwest quarter, and lot 1 of section 30, and lots 3 and 4 in section 19, township 10 south, range 22 east, Boise Meridian, and being 160 acres in area.

3. That said land is agricultural land, arid in character, and requires the artificial application of water thereon before crops can be successfully or profitably raised thereon.

4. That said lands lie on the north side of that certain stream flowing through the State of Idaho in a westerly direction and known as Snake River, and are contiguous to said river.

13 5. That the only available water supply for use upon said lands is the flow of the waters of Snake River.

6. That the flow of the water of said Snake River immediately south of and opposite said tract of land is naturally rapid, and the flow of the water of said river at said point when confined to or near the northerly bank of said river was before the actions of the defendant hereinafter stated of such velocity as to be available for power purposes.

7. That on or about the year 1889, the predecessors in interest of the plaintiff appropriated 400 inches of the flow of the waters of said Snake River for use upon said lands, and did as soon as practicable after making said appropriation, and at a cost of $5,000, build and erect two water-wheels in said Snake River, near the north bank thereof, and in front of the said lands of plaintiff, each of said wheels being about 26 feet in height, and constructed a wing dam in said river about 100 feet in length, so built and constructed as to confine the flow of the said waters of said river to the northerly bank thereof, and to raise said water three feet or thereabouts above the natural

height of the waters of said river directly above said water-wheels, and each of them, and thus caused said water-wheels, and each of the two, to revolve, and by means of buckets fastened thereon to lift water to the extent of 400 inches, miner's measurement, under a four-inch pressure, and empty the same into flumes adjoining said wheels, and said water by means of said flume was carried in said flumes from said wheels to ditches constructed by the plaintiff and carried to and over his said lands, and used thereon to cultivate and irrigate the same; that all of said lands is and was covered by said ditches and can be irrigated therefrom, and that said ditches and said flumes are of sufficient size and carrying capacity to carry said amount of water, and that said water in said amount is necessary for the successful irrigation and cultivation of said land.

8. That the plaintiff and his predecessors in interest have continuously, and during the irrigating season of each year from and after said appropriation was made as aforesaid used said water upon said lands for the irrigation and cultivation thereof, and lifted, conveyed and distributed said water to and upon said lands by means of said wing dams, flumes and water-wheels and ditches, and raised crops of hay, grain and vegetables, and made pasture of said lands during the fall and winter months of each year, the value of said crops varying from year to year.

9. That twenty acres of said land lying contiguous to said Snake River is mining ground, although valuable for agricultural purposes, is valuable also for the gold and other precious metals contained therein; that in order to successfully mine said ground it is necessary to use water thereon in the amount of said 400 inches miner's measurement under a four-inch pressure, and to convey said water to and upon said land by means of water-wheels and flumes and ditches of the plaintiff hereinbefore mentioned and described. That in order to successfully mine upon said land it is necessary that the water in said river be at a low stage and that when said waters are backed up by the hereinafter-mentioned and described dams and appliances of the defendant said lands cannot be mined successfully or at all, and become valueless for mining purposes.

10. Plaintiff repeats subdivisions IX, X, XI and XII of the first cause of action herein, and makes the same a part of this his third cause of action herein.

11. That by reason of said backing up of said water, and stopping plaintiff from using said water wheels to raise the waters of said Snake River to and upon his said land plaintiff has been damaged in the sum of ten thousand dollars.

Wherefore, plaintiff prays judgment against the defendant for said sum of $26,550 on said first cause of action, and said sum of $20,000 on said second cause of action, and for said sum of $10,000 on said third cause of action, making in the aggregate the sum of $56,550 and for costs of suit.

J. C. ROGERS AND
HAWLEY, PUCKETT & HAWLEY,
*Attorneys for Plaintiff.*

16 STATE OF IDAHO,
*County of Ada, ss:*

James H. Hawley, being first duly sworn, deposes and says: That he is an attorney at law and a member of the firm of Hawley, Puckett & Hawley, who are attorneys for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be upon information and belief, and as to those matters he believes it to be true; that the reason this verification is made by affiant instead of by the plaintiff is that the plaintiff lives in Lincoln County, Idaho, and that the place of residence of affiant and other members of the firm of Hawley, Puckett & Hawley is in Ada County, Idaho, and the residence of J. C. Rogers, the other attorney for the plaintiff is in Cassia County, Idaho; that the information of affiant herein is based upon statements made to him by the plaintiff and others, and from an inspection of the premises.

JAMES H. HAWLEY.

Subscribed and sworn to before me this 22d day of July, 1905.

[SEAL OF NOTARY.] G. G. ADAMS.

[Endorsed:] In the District Court, Fourth Judicial Dis-
17 trict, Lincoln County, Idaho. Henry Schodde, Plaintiff, *vs* The Twin Falls Land and Water Company, a Corporation, Defendant. Complaint. Filed July 24, 1905, at 9 A. M. A. I. McMahon, Clerk. Hawley, Puckett & Hawley, Atty's for Plaintiff.

In the District Court of the Fourth Judicial District of the State of Idaho in and for Lincoln County.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Petition for Removal of Cause to United States Circuit Court.*

To the District Court of the Fourth Judicial District of the State of Idaho, in and for Lincoln County:

Your petitioner, the Twin Falls Land and Water Company, the defendant in the above-entitled action, respectfully shows to this Honorable Court:

1. That your petitioner is the defendant named in the above-entitled action, and that the matter and amount in dispute in said cause exceeds the sum of value of $2,000, exclusive of interest and costs; that the above-entitled action *in* a suit of a civil nature
18 brought at law to recover the sum of $56,550 for damages alleged to have been sustained by the plaintiff in consequence of the raising by means of a dam of the waters of Snake River, all of which will more fully appear by reference to the complaint of plain-

tiff on file herein which is hereby referred to and made a part of this petition.

2. That the controversy in said action is, and at the time of the commencement of this suit was wholly between citizens of different States; that your petitioner the defendant in this suit was and still is a corporation organized and existing under and pursuant to the laws of the State of Utah, and was at the time of the commencement of said action, and still is a citizen of said State of Utah, and not a citizen of any other State, and was at the time of the commencement of said action and still is a nonresident of the State of Idaho; and that the said plaintiff Henry Schodde was at the time of the commencement of this action and ever since has been, and still is, a resident and citizen of the State of Idaho, and that the said Henry Schodde at the time of the commencement of this suit was not, and has not been at any time since the commencement thereof, and is not now, a resident or citizen of any other State than the State of Idaho; and that there are no other parties to this suit save the plaintiff and defendant above named.

19 3. That your petitioner offers herewith a bond with a good and sufficient surety for the entering in the Circuit Court of the United States for the District of Idaho on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

4. That your petitioner has not yet appeared, answered or demurred in this action, except for the purpose of this application and that its time to appear, answer or demur pursuant to the laws of the State of Idaho, has not yet expired.

Your petitioner therefore prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said bond and surety, and to cause the record herein to be removed into the Circuit Court of the United States in and for the District of Idaho, pursuant to the laws of the United States.

And your petitioner will ever pray.

TWIN FALLS LAND AND WATER COMPANY,
By S. B. MILNER, *Its Director and Agent,*
By HENDERSON, PIERCE, CRITCHLOW & BARRETTE, *Its Attorneys.*

20 STATE OF UTAH,
*County of Salt Lake, ss:*

Stanley B. Milner, being first duly sworn, deposes and says: I am an officer and agent of the Twin Falls Land and Water Company, a corporation, the petitioner herein, to wit, a director thereof, and as such I make and am authorized to make this affidavit of verification for and on its behalf. I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge.

STANLEY B. MILNER.

Subscribed and sworn to before me this 11th day of August, A. D. 1905.

[SEAL OF NOTARY.] FRANK E. LOSEE,
*Notary Public.*

My commission expires December 31, 1907.

In the District Court of the Fourth Judicial District of the State of Idaho in and for Lincoln County.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Bond on Removal.*

Know all men by these presents, that the Twin Falls Land
21 and Water Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Utah, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Henry Schodde, the above-named plaintiff in the penal sum of five hundred dollars ($500.00) lawful money of the United States of America, for the payment whereof well and truly to be made unto the said Henry Schodde, his heirs, representatives and assigns, we hereby bind ourselves, our and each of our successors, representatives and assigns, jointly and severally firmly by these presents.

Upon these conditions nevertheless, that whereas the said Twin Falls Land and Water Company has petitioned the District Court of the Fourth Judicial District of the State of Idaho, in and for Lincoln County, for the removal of a certain cause therein pending wherein said Henry Schodde is plaintiff and the said Twin Falls Land and Water Company is defendant, to the Circuit Court of the United States for the District of Idaho.

Now, if the said Twin Falls Land and Water Company shall enter in said Circuit Court of the United States on the first day of its next session a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United
States, if said Circuit Court shall hold that said suit was
22 wrongfully or improperly removed thereto, then this obligation to be void; otherwise it shall remain in full force and virtue.

In witness whereof the parties hereto have hereunto set their hands and seals this 10th day of August, A. D. 1905.

TWIN FALLS LAND AND WATER COMPANY,
By S. B. MILNER, [SEAL.]
*Its Director and Agent.*
AMERICAN SURETY COMPANY OF NEW YORK,
By MATHOMAHATE THOMAS, [SEAL.]
*Surety, Resident Vice-President.*
PHILLIP SMAYCOCK,
*Resident Assistant Secretary.*

Approved August —, 1905.

——, *Judge.*

In the District Court of the Fourth Judicial District of the State of Idaho in and for Lincoln County.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Order for Removal.*

The defendant herein having within the time provided by law filed its petition for the removal of this cause into the Circuit Court of the United States in and for the District of Idaho, and having at the same time offered its bond in the sum of $500, with American Surety Company of New York, a good and sufficient surety pursuant to the Statute and conditioned according to law.

Now, therefore, it is ordered that the said petition and bond be accepted and approved, and that this cause be removed to the Circuit Court of the United States in and for the District of Idaho, pursuant to the Statutes of the United States; and it is further ordered that this Court proceed no further in this suit.

LYTTLETON PRICE,
*District Judge.*

Dated August 23d, 1905. In Chambers at Hailey, Blaine Co.

[Endorsed:] Removal Papers. In the District Court, Fourth Judicial District, Lincoln County, Idaho. Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Company, Defendant. Filed Aug. 16th, 1905. A. I. McMahon, Clerk. Henderson, Pierce, Critchlow & Barrette, Attorneys for Defendant.

*Clerk's Certificate to Judgment-Roll.*

STATE OF IDAHO,
*County of Lincoln, ss:*

I, A. I. McMahon, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Lincoln, do hereby certify that the foregoing papers are all the papers which have been filed in this Court, in the case of Henry Schodde *vs.* The Twin Falls Land and Water Company, and that the foregoing is a true copy of the same.

Witness my hand and official seal this 26th day of August, 1905.
[SEAL.] A. I. McMAHON, *Clerk.*

[Endorsed:] No. 258. In the District Court, —— Judicial District of the State of Idaho, in and for —— County. Certified copies of Papers. Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Co., a corporation, Defendant. Filed Sept. 11, 1905. A. L. Richardson, Clerk. Hawley, Puckett & Hawley, & J. C. Rogers, Attorneys for Plaintiff.

In the Circuit Court of the United States, Eighth Circuit, District of Idaho.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Demurrer.*

Now comes the defendant and for its demurrer to the complaint alleges:

1. As to the first cause of action.

(*a*) That the same is uncertain in this; that the location of the lands alleged in the 13th paragraph thereof to have been covered by the waters of Snake River backed up by the dam of defendant is not described nor the boundaries thereof given or the legal subdivision in which the same are, nor is any fact or particular stated from which defendant may identify said lands or ascertain the same to a common certainty or at all.

26 (*b*) That two separate causes of action have been joined in this portion of the complaint and are not separately stated, to wit, a supposed cause of action for the destruction or flooding of certain wheels and dams whereby it has become impossible to irrigate land, with a cause of action for flooding of lands.

(*c*) That said first cause of action, so called, does not as to the first twelve paragraphs and the first half of the 13th paragraph thereof, state any cause of action against this defendant.

2. As to the second cause of action that the same does not state facts sufficient to constitute a cause of action against this defendant.

3. As to the third cause of action that the same does not state facts sufficient to constitute a cause of action against the defendant.

HENDERSON, PIERCE, CRITCHLOW & BARRETTE,
*Attorneys for Defendant.*

[Endorsed:] No. 258. Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Co., Defendant. Demurrer. Filed Sept. 11, 1905. A. L. Richardson, Clerk. Henderson, Pierce, Critchlow & Barrette, Attorneys for Defendant.

27 In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Order Extending Time to File Bill of Exceptions.*

Upon good cause shown, it is hereby ordered that the plaintiff in the above-entitled action may have until September 15, 1906, in which to prepare and serve and file bill of exceptions in the above-entitled action.

JAS. H. BEATTY, *Judge.*

[Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde, *vs.* Twin Falls Land and Water Company. Order Extending Time to File Bill of Exceptions. Filed May 3, 1906. A. L. Richardson, Clerk.

28 In the Circuit Court of the United States, Central Division, District of Idaho.

No. 258.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Judgment.*

The defendant's demurrer to the complaint in this action having been sustained by the Court and the plaintiff having declined to further plead in said cause:

It is therefore, by virtue of the law and by reason of the premises aforesaid, ordered and adjudged that said cause be dismissed absolutely, and that said defendant have and recover from the said plaintiff its costs and disbursements herein taxed at the sum of $——.

Dated May 3, 1906.

JAS. H. BEATTY, *Judge.*

29 [Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde, *vs.* Twin Falls Land and Water Company. Judgment. Filed May 3, 1906. A. L. Richardson, Clerk.

[Endorsed:] In the Circuit Court of the United States for the District of Idaho. Judgment Roll No. 258. Henry Schodde, *vs.* Twin Falls Land and Water Company. Filed May 3d, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY, (a Corporation), Defendant.

*Decision on Demurrer.*

Hawley, Puckett & Hawley, and J. C. Rogers, for Plaintiff.
Henderson, Pierce, Critchlow & Barrette, for Defendant.

BEATTY, *J.*:

The plaintiff alleges that he is the owner of certain described lands on the banks of Snake River; that for the purpose of irrigating said lands, he built in the river, water wheels to be run by the force of the current, and thereby to raise water a sufficient elevation to conduct it over such lands.

30 Long after plaintiff's possession of such premises the defendant, for the purpose of irrigating a large tract of country built across said river about nine miles below plaintiff's said possessions, a dam of such height that it so raises the water at plaintiff's said water-wheels as to destroy all current there and render the wheels useless and greatly damage his lands, amounting in all to about 424 acres, for which he asks $56,550 damages or an average of about $130 per acre. This is demanding far more as damages to the lands than the full market value of any lands in that country, and certainly, if the land is rendered entirely worthless, its fair market value is the most that can be expected in damages. Such extravagant demands do not play upon any sympathizing chord in the breast of the court. To the complaint, the defendant demurs, setting up several causes, the most important of which is that the facts stated do not constitute a cause of action. Under this assignment, defendant admits in argument that plaintiff is entitled to the water he has actually appropriated and diverted to his lands for use thereon, but denies that he is entitled to his claim for protection to his said water-wheels, or his claim that the river must be left in such stage of water that they may be operated as formerly. Accustomed as we are in this water country to the free and almost unlimited appropriation and use of any of nature's products

31 and to be protected therein under the law that he who is first in time is first in right, this propositon at first seems an innovation. It is, however, worthy of most careful investigation. It is, so far as I am advised, entirely new and has never been directly discussed or decided by any court.

The respective rights of these parties may to some extent be modified or measured by the natural conditions existing in that country. Snake River is one of the largest streams of the country, carying an immense volume of water, through an arid but fertile land, suscepti-

ble of the highest cultivation through the use of these waters and thus of providing homes for thou ands of people. Already throughout the great tract of land under the defendant's irrigating system, active towns are springing up; the entire landscape is dotted with the humble habitation of the home builder; everywhere life, vigor and hope prevail, and it is not the mirage of the desert, where phantom groves and lakes and palaces delight the eye, but it is the certain prophecy of a prosperous civilization envolving from past desolation. To a large extent the control of such rivers is under the control of the government and state and should be so controlled that the greatest good may result to the many. The government and the state by their laws are co-operating to confer upon the defendant the right to divert the waters of such river to irrigate
32 and redeem the large country now under its canals. Can the plaintiff, or even the comparatively few others scattered along the banks of said river in like situation, retard or obstruct in any degree the grand scheme of the government in the reclamation of its arid lands? The claim and argument of the defendant is that the plaintiff, in locating and making the improvements which he has, must have done so in anticipation that some time this river would be used, just as defendant and others with similar schemes fostered by the government, are now using it; that his use would be subject to such future use, and that even if he does suffer damage by this subsequent use, it is only such as he should have anticipated and for which he cannot claim damages; that it is *damnum absque injuria.*

It is conceded and is beyond question, that the statute law as well as judicial authority directly protects plaintiff in all water he has actually appropriated, diverted and used, but there is no statute, nor so far as known, any judicial rulings, protecting him in the establishment and in the use of his water-wheels, as he claims to, and must, use them for the diversion of water to his land. The only way in which his wheels can be used for the purpose he intended them, is to preserve the river in the condition it was when he erected them. And with what result, it may be asked. It may be
33 stated as a fact that the banks of the river and the adjacent country sustain such relations to each other, that the latter cannot be irrigated by ditches cut from the river in its natural state and the erection of dams becomes a necessity, which of course changing the surface elevation of the water affects the plaintiff's premises and all others similarly situated. Then without the dam the Twin Falls scheme with all its present great promise fails. Not only this, but the government is now constructing a dam across the river some distance above plaintiff for another extensive irrigating scheme, known as the Minidoka project, which will take a large amount of the water and so much, that probably there will not be enough left, especially at low stages of the river, for the full operation of plaintiff's wheels. Also other like schemes farther up and elsewhere along the river are in contemplation and only through such can the country be redeemed from a non-productive condition. That the full protection of plaintiff's claim would probably result so

disastrously to the interests of the many, is not a sufficient reason why any vested rights he may have can be ignored, but it is a reason why his claims must be scrutinized; why they must clearly appear to be supported by law before being allowed; why they must be weighed in the same scales which adjust between the claims of a community and those of an individual and sometimes com-
34 pel the interest of the individual to yield to those of the many.

As by Art. 15, Sec. 3, Constitution of Idaho, all unappropriated waters are subject to appropriation, it follows that all water that plaintiff has legally appropriated belongs to him, but all other is subject to appropriation. It is unquestioned that what he has actually diverted and used upon his land, he has appropriated, but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation; it is not reasonable. Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he had made such a reasonable use of the 900, as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel, that by a ditch he can draw off to his land his 100 inches, can he then object to those above him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropria-
35 tion. In effect this is substantially the principle that plaintiff is asking to have established.

During the argument the question of enjoining defendant has been referred to. To grant this against defendant it would be conceded by all would be practicaly fatal to a great enterprise and result in immeasureable damage, or at least would leave defendant subject to any demand that plaintiff chose to make. The plaintiff says that would not be asked and that damages only are asked. It is not what the plaintiff may be content with, but the principle involved is the important question. If plaintiff is entitled to damages it must be because he has such vested rights as might be entitled to protection by injunction upon timely application. Such seems to be the doctrine of New York City *vs.* Pine, 185 U. S. 93. In that case the party delayed his action until the work had been done and the court intimated (96) that had it been commenced in time he would have been entitled to an injunction, but having delayed he could have only his damages. A court may well hesitate to establish a principle that will enable an individual here and there under such facts as exist in this case, to tie up or greatly delay the progress and development of an entire country, or, if not that, then to levy upon a community such tribute as may be limited only by greed or generosity. The plaintiff's counsel rather subtly
36 says: "We do not contend, as the counsel would have the court believe, that we can tie up a stream so that no one else

can use it and that all those other matters may never be accomplished or achieved. We simply claim that where a party changes condition so as to interfere with vested rights he must compensate the party injured before he can do so." Granting his premises, his argument would be conclusive, but he assumes that plaintiff's claim, that the conditions of the river as he found them should remain unchanged, constitutes, in part at least, a vested right. That he has vested rights, and what constitutes them, is the contested question and cannot be assumed.

My opinion is that the plaintiff's claim, that he is entitled to have the river remain in the condition he found it, cannot be sustained, nor that he is entitled to damages for any change made in it; that his claim in this respect is not a vested right. As this conclusion may be wrong and as it is the question on which the case must turn, it should, if possible, be settled before the parties are put to the expense of a trial on the merits. All the questions so ably presented by counsel have been carefully considered, but it has not been deemed necessary to discuss all, or any, fully, here, but for the reasons stated the demurrer is sustained.

Pursuant to the stipulation of the counsel, a like order to
37 that made in this case is made in the other case of Henry Schodde and wife versus the same defendant.

Dated, Boise, Idaho, April 26, 1906.

[Endorsed:] No. 258. In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Co., a corporation, Defendant. Decision on Demurrer. Filed April 26, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

No. 258.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY, (a Corporation), Defendant.

*Bill of Exceptions.*

Be it remembered that on this 13th day of March, 1906, this cause came on for hearing before Hon. James H. Beatty, presiding judge, and the following procedings were had, to wit:

The demurrer heretofore filed coming duly on to be heard, E. B. Critchlow, Esq., appearing on behalf of defendant and in support of the demurrer, and James H. Hawley and W. E. Borah, in
38 behalf of the plaintiff, and against said demurrer. After argument of the same said demurrer was submitted and taken under advisement.

That thereafter on the 26th day of March, 1906, the Court an-

nounced its decision on said demurrer to the complaint, sustaining the same, and directed the entering of the following order—ordered that said demurrer be, and the same hereby is sustained—to which action of the court in sustaining said demurrer, the defendant then and there duly exceuted, which exception was by the Court allowed.

That thereupon the plaintiff announcing through his attorneys that he did not desire to amend the complaint and would decline to further plead, the court entered the following order: "It is therefore by virtue of the law and by reason of the premises aforesaid, ordered and adjudged that said case be dismissed and that said defendants have and recover from said plaintiff its costs and disbursements herein, taxed at the sum of $—," to which action of the court, dismissing said action, the plaintiff then and there excepted, which exception was by the Court allowed.

Thereupon the Court made, signed and caused to be entered of record upon said day the following order: "Upon good cause shown, it is hereby ordered that the plaintiff in the above-entitled action may have until September 15th, 1903, in which to prepare,
39 serve and file bill of exceptions in the above entitled action.
(Signed) JAS. H. BEATTY, *Judge.*"

And now in furtherance of justice, and that right may be done, the plaintiff tenders and presents the foregoing as his bill of exceptions to the action of the Court, and prays that the same be allowed and signed and sealed by the Court and made a part of the record, and the same is done this 15th, day of August, 1906.

JAS. H. BEATTY, *Judge.*

[Endorsed:] No. 258. U. S. Circuit court, Central Division, District of Idaho. Henry Schodde *vs.* Twin Falls Land and Water Co., Bill of Exceptions. Filed Aug. 15, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

40 *Petition for Writ of Error.*

Now comes Henry Schodde, the plaintiff herein, and says that on the 3d day of May, 1906, judgment was entered herein in favor of the defendant and against the plaintiff dismissing the action herein and for costs of suit, and that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will appear in detail from the assignments of error herein.

Wherefore, said plaintiff prays that a writ of error may issue in

his behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that the transcript of the record and the papers in this case duly authenticated may be sent to the said Circuit Court of Appeals; and also that an order may be made fixing the amount of security which plaintiff shall give and furnish upon said writ of error and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and for this your petitioner will ever pray.

Dated September 14, 1906.

HAWLEY, PUCKETT & HAWLEY AND
W. E. BORAH.
*Attorneys for Plaintiff.*

41 [Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde *vs.* Twin Falls Land Water Co. Petition for Writ of Error. Filed Sept. 14, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Assignment of Errors.*

The plaintiff, Henry Schodde, in this action in connection with his petition for writ of error makes the following assignments of error which he offers the Court:

1. The Court erred in sustaining the demurrer of said defendant to plaintiff's complaint herein.

2. The Court erred as to this plaintiff in ordering said demurrer to be sustained and judgment to be entered dismissing the action and for costs against the plaintiff.

3. The Court erred as to this plaintiff in entering judgment in favor of defendant and against the plaintiff.

42 4. The Court erred as to this plaintiff in holding that the complaint herein did not state a cause of action against the defendant.

5. The Court erred as to this plaintiff in holding that the defendant was not liable for damages for the destruction of the water-wheels and the depriving of the plaintiff of water of said wheels and the use of water for his said land.

HAWLEY, PUCKETT & HAWLEY AND
W. E. BORAH.
*Attorneys for Plaintiff.*

[Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde *vs.* Twin Falls Land and Water Co. Assignments of Error. Filed Sept. 14, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Order for Filing Bond.*

43 The plaintiff, Henry Schodde, having this day filed his petition for a writ of error from the decision thereon made and entered herein to the United States Circuit Court of Appeals in and for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which said defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon said plaintiff, Henry Schodde, filing with the clerk of this Court a good and sufficient bond in the sum of $500.00, to the effect that if the said Henry Schodde, plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation is to be void, else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings of this Court be and they are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals.

JAS. H. BEATTY, *Judge.*

Dated September 14, 1906.

44 [Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde *vs.* Twin Falls Land and Water Company. Order for Filing Bond. Filed Sept. 14, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Order Allowing Writ of Error.*

On motion of Messrs. Hawley, Puckett & Hawley and W. E. Borah, attorneys for plaintiff, and upon filing a petition for writ of error and assignments of error, it is

Ordered that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit the judgment heretofore entered herein and the other matters and things in said petition set forth and that the amount of the bond on said writ of error be and is hereby fixed at $500.00. JAS. H. BEATY, *Judge.*

45 [Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Company, a Corporation, Defendant. Order Allowing Writ of Error. Filed Sept. 14, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Bond on Writ of Error.*

Know all men by these presents, that Henry Schodde, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the Twin Falls Land and Water Company, a corporation, in the sum of $500.00, to be paid to the said Twin Falls Land and Water Company, a corporation, its successors or assigns, for which payment well and truly to be made we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of September, 1906.

46 Whereas, lately at a Circuit Court of the United States, for the Central Division, State of Idaho, in a suit pending in said court between Henry Schodde, plaintiff, and the Twin Falls Land and Water Company, a corporation, defendant, a judgment was rendered against said plaintiff, and the said plaintiff having obtained from the said Court a writ of error to reverse the judgment in the aforesaid suit and a citation directed to the said Twin Falls Land and Water Company citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California.

Now, the condition of this obligation is such that if the said Henry Schodde shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the obligation is to be void; else to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this 14th day of September, 1906.

HENRY SCHODDE,
By HAWLEY, PUCKETT & HAWLEY,
*His Attorneys, Principal.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Surety,*
By SHERMAN G. KING, [SEAL.]
*Its Attorney in Fact, Sureties.*

47 STATE OF IDAHO,
*County of Ada, ss:*

On this 14 day of Sept., 1906, before me, Walter S. Walker, a notary public in and for said county, personally appeared Sherman G. King, known to me to be the person whose name is subscribed to the within instrument, as the attorney in fact of the Fidelity and Deposit Company of Maryland, and acknowledged to me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto as principal, and his own name as attorney in fact.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate above written.

[SEAL.] WALTER S. WALKER,
*Notary Public.*

[Endorsed:] No. 258. U. S. Circuit Court, Central Division, District of Idaho. Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Company, a Corporation, Defendant. Bond on Writ of Error. Filed Sept. 14, 1906. A. L. Richardson, Clerk.

The within bond is hereby approved.

JAS. H. BEATTY, *Judge.*

48 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, for the District of Idaho, Greeting:

Because of the records and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court before the Honorable James H. Beatty, one of you, between Henry Schodde, plaintiff, plaintiff in error, and Twin Falls Land and Water Company, a corporation, defendant, and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error as by complaint doth appear, and we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do
49 command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, together with this writ, so that you have the same at San

Francisco on the 13th day of October, 1906, in said United States Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being then and there inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right according to the laws and customs of the United States of America should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this, the fourteenth day of September A. D. 1906.

[SEAL.] A. L. RICHARDSON,
*Clerk of the Circuit Court of the United States of the District of Idaho, Central Division.*

Service of the above and foregoing, together with copy, accepted this 17th day of September, 1906.

HENDERSON, PIERCE, CRITCHLOW & BARRETTE, *Attorneys for Defendant.*

[Endorsed:] No. 258. In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.
50 Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Company, a Corporation, Defendant. Writ of Error. Filed September 20th, 1906. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Citation.*

UNITED STATES OF AMERICA,
*District of Idaho, ss:*

To Twin Falls Land and Water Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco on the 13th day of October, 1906, pursuant to a writ of error filed in the clerk's office in the Circuit Court of the United States, for the District of Idaho, Central Division, wherein Henry Schodde is plaintiff in error and you are defendant in
51 error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this, the fourteenth day of September, A. D. 1906.

JAS. H. BEATTY, *Judge.*

Attest:
[SEAL.] A. L. RICHARDSON, *Clerk.*

Service of the above and foregoing, together with copy, accepted this 17th day of Sept., 1906.

HENDERSON, PIERCE, CRITCHLOW & BARRETTE, *Attorneys for Defendant.*

[Endorsed:] No. 258. In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho, Central Division. Henry Schodde, Plaintiff, *vs.* Twin Falls Land and Water Company, a Corporation, Defendant. Citation. Filed September 20th, 1906. A. L. Richardson, Clerk.

*Return to Writ of Error.*

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid,
52 together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[SEAL.] A. L. RICHARDSON, *Clerk.*

In the United States Circuit Court, Ninth Judicial Circuit, District of Idaho.

HENRY SCHODDE, Plaintiff,
*vs.*
TWIN FALLS LAND AND WATER COMPANY (a Corporation), Defendant.

*Clerk's Certificate to Transcript.*

I, A. L. Richardson, Clerk of the Circuit Court of the United States, in and for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 46, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

53 I further certify that the cost of the record herein amounts to the sum of $41.40, and that the same has been paid by the appellant.

Witness my hand and the seal of said Circuit Court affixed at Boise, Idaho, this 22d day of September, 1906.

[SEAL.] A. L. RICHARDSON, *Clerk.*

[Endorsed:] No. 1380. United States Circuit Court of Appeals for the Ninth Circuit. Henry Schodde, Plaintiff in Error, *vs.* Twin Falls Land and Water Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division. Filed September 29, 1906. F. D. Monckton, Clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWINN FALLS LAND & WATER COMPANY, Defendant in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-three (53) pages, numbered from one (1) to fifty-three (53), inclusive, to be a true copy of the printed Transcript of Record upon writ of error to the United States Circuit Court for the District of Idaho, Central Division, in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this twenty-second day of May, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

55 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWINN FALLS LAND AND WATER COMPANY, a Corporation, Defendant in Error.

ADDENDA.

*Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

56 At a stated term, to wit: the October term A. D. 1907 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Thursday, the seventeenth day of October in the year of our Lord one thousand, nine hundred and seven.

Present: Honorable William B. Gilbert, Circuit Judge, Honorable Erskine M. Ross, Circuit Judge, Honorable William W. Morrow, Circuit Judge.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWINN FALLS LAND & WATER COMPANY, Defendant in Error.

*Order of Submission.*

Ordered, above-entitled cause argued by Messrs. Jesse B. Hawley and W. E. Borah, counsel for the plaintiff in error and Mr. E. B. Critchlow, counsel for the defendant in error and submitted to the Court for consideration and decision.

57 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWIN FALLS LAND AND WATER COMPANY, a Corporation, Defendant in Error.

*Opinion U. S. Circuit Court of Appeals.*

In Error to the United States Circuit Court for the District of Idaho.

The plaintiff in error was plaintiff in the court below in an action against the defendant in error to recover damages alleged to have been sustained by the plaintiff by reason of the defendant having constructed a dam across Snake River in Idaho so as to back the water of the river up stream to and beyond plaintiff's premises, to the injury and damage of his water right in said stream.

Plaintiff's complaint contains three counts. Briefly stated, the cause of action as set out in the three counts of the complaint, is as follows: Plaintiff is the owner of three tracts of land on the banks of Snake River, containing in the aggregate 429.96 acres.
58 Two of these tracts, containing 263.96 acres, are on the south bank and one tract of 160 acres is on the north bank. One of the tracts on the south bank is agricultural land and the other is partly agricultural land and partly mining ground. The tract of land on the north bank is agricultural. In the year 1889 plaintiff's predecessors in interest and in 1895 the plaintiff himself, appropriated certain quantities of water of the flow of Snake River for use on said lands. In the first count the quantity is stated in cubic feet per second; in the second and third counts the quantities are stated in miner's inches. The aggregate of water appropriated as alleged in the three counts is referred to in the briefs as 1250 miner's inches. Soon after this water was appropriated the parties in interest erected water-wheels in the river to lift the water to a sufficient height for distribution over the land. Nine of these wheels

were erected opposite or near the tracts on the south side of the river and two near the tract on the north side of the river. These wheels vary in height from 24 to 34 feet. The parties also constructed wing-dams in the river adjoining or in front of the lands owned by them, for the purpose of confining the flow of the water of the river and raising it at such points above the natural flow of the river, so that the current would drive the water-wheels and cause them to revolve and carry the water in buckets attached to the wheels to a height where it would be emptied into flumes and distributed over the lands by ditches and used thereon to irrigate and culti-
59 vate the agricultural land and work the mining ground. It is not alleged in the complaint, but it is assumed that the river at this point runs between high banks and that the water is lifted by the wheels at least 20 feet before it is emptied into the flumes for distribution over plaintiff's lands. In the year 1903, while plaintiff was using the appropriated water of the river upon the described premises, the defendant commenced the construction of a dam across Snake River at a point about nine miles westerly from and below the lands of the plaintiff. The work was prosecuted on said dam until its completion in March, 1905. This dam is so constructed as to impound all the water of Snake River flowing at said point and to raise the water about forty feet in height. It is alleged that when defendant's dam was filled with water the water was turned into a canal known as the Twin Falls canal, owned by the defendant and located on the north side of the river; that this canal was constructed at a cost, as plaintiff is informed and believes, of $1,500,000, for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300,000 acres of arable and arid lands situated below the dam; that for said lands and for a great number of people, being, as plaintiff is informed and believes, five thousand in number, there is no other supply available for irrigation, stock, domestic or manufacturing purposes except the water from said canal. It is alleged that by reason of this dam the waters of Snake River have been backed up from said dam
60 and to and beyond plaintiff's premises and have destroyed the current in the river by means of which plaintiff's water-wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands. It is alleged that it is now impossible for plaintiff to so arrange or change his said dams or water-wheels or flumes, or to build or construct other dams or water-wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff had not been able to irrigate said lands or any part thereof or to raise profitable crops thereon or to use the same as pasture lands, and will not in the future be able to irrigate said lands or to raise profitable crops or any crops thereon, as long as defendant's dam is maintained; that there is no other supply of water available for use upon said lands except the waters of Snake River; that by reason of the backing up of said water and stopping the plaintiff from using said water-wheels to raise the waters of Snake River to and upon said lands and cutting off the water supply from

plaintiff's lands he has been damaged in the aggregate sum of $56,650.

In the first count of the complaint a separate and distinct cause of action is alleged in an averment that about twelve acres of plaintiff's land *has* been covered by the waters of Snake River backed up by defendant's dam, but the land is not described or its boundaries given or any particulars stated so that the land can be identified or ascertained. To this cause of action defendant interposed a special demurrer on the ground of uncertainty and the improper
61 joinder of two separate causes of action. This special demurrer appears to be admitted.

The defendant also interposed a general demurrer on the ground that the facts stated in the complaint do not constitute a cause of action against the defendant as to either or any of said counts. The demurrer was sustained by the Circuit Court, and the plaintiff has brought the cause to this court upon a writ of error.

Hawley, Puckett & Hawley and W. E. Borah, Attorneys for Plaintiff in Error.

E. B. Critchlow, Attorney for Defendant in Error; Henderson, Pierce, Critchlow & Barrette, Counsel.

Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the Court:

The assignments of error present the single question whether the facts stated in the complaint constitute a cause of action against the defendant. It is not denied that the plaintiff has the right by appropriation to divert 1,250 miner's inches of the waters of the Snake River, mainly for irrigation purposes, and it is not charged
62 by plaintiff that this amount of water is not still in the river subject to his right of appropriation and diversion. His claim is that he cannot divert it by the means he first adopted for taking the waters from the river and that the defendant by placing a dam across the river has deprived him of the right to the current of the river which prior to the erection of the dam rendered his means of diversion available. Is this current and the means adopted for the diversion of the appropriated water part of or attached to plaintiff's right of appropriation? It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location and that the means of utilizing that current is attached as an appurtenance to the appropriation. We have not been referred to any case—and we know of none—where either of these propositions has been upheld.

The claim that the right to the current of the river is appurtenant to the water location is contrary to well-established principles of the common law governing such a relation. The water location was an appropriation and diversion of a certain quantity of the flowing water of the stream. The current of the river is part of the stream. There can be no right to the current of a stream as appurtenant to a diversion of the flowing waters

of the stream. The two rights in such case would be equal and of the same character and quality, and one such right cannot be appurtenant to the other. "Lord Coke says (Co. Litt. 121*b*.): A thing corporeal cannot properly be appurtenant to a thing
63 corporeal nor a thing incorporeal to a thing incorporeal. According to this rule land cannot be appurtenant to land." Harris *v.* Elliott, 10 Pet. 25, 53; Leonard *v.* White, 6 Mass. 8; Jackson *v.* Hathaway, 15 Johns 447; Jones *v.* Johnson, 18 How. 150, 155.

"It follows that things in their nature equal and of like character and grade can never be appurtenant to each other, for the common as well as the legal meaning of the word implies inferiority and dependence, so that a water ditch could never become appurtenant to another water ditch of like character and pass as an incident thereto, for the same reason that one farm will not pass as an appurtenance to another." Donnell *v.* Humphreys, 1 Mont. 518, 528. The reason for such a rule in the present case is as forcible as in any of the cases cited. If the plaintiff were permitted to own the current of the stream as appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he would control and own. There might be a great surplus of water in the stream at and above plaintiff's premises and an urgent demand for a portion of this surplus for beneficial uses, but if an appropriator above should divert a sufficient quantity to lower the current under plaintiff's water wheels so that they could not revolve, the plaintiff would have a cause of action to prevent such an appropriation. It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated.

But aside from this rule of common law, which we think denies the right of the appropriator to claim the current of the
64 stream as appurtenant to his water location, the law of appropriation is itself opposed to such a claim. It is provided in the Constitution of the State of Idaho, Art. XV, Sec. 3, that: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied." In the Revised Statutes of Idaho of 1887, under the title "Water Rights and Irrigation," a method of procedure is provided for the appropriation and diversion of running water flowing in a river or stream for a useful or beneficial purpose. This procedure involves three distinct acts on the part of the appropriator: First, the person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein (1) that he claims the water there flowing to the extent of (giving the number) inches measured under a four-inch pressure, and accurately describing the point of diversion; (2) the purpose for which he claims it and the place of intended use; (3) the means by which he intends to divert it and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted (Sec. 3160); Second, a diversion of the water within a reasonable time (Secs. 3157, 3158,

3161, 3162, 3163); Third, the actual application of the water to a useful and beneficial purpose.

In Colorado, which like Idaho has adopted the law of appropriation as distinguished from the common law doctrine of
65 riparian rights, it has been held that there must be not only an actual diversion made with the intent to apply the water to beneficial use, but the water must be actually applied to such use. In Fort Morgan Land & Canal Co. *v.* South Platte Ditch Co., 30 Pac. 1032, 1033, Chief Justice Hayt, in delivering the opinion of the Court, said: "From the first this Court has recognized and emphasized the idea that a priority could only be legally acquired by the application
65 riparian rights, it has been held that there must be not only a diversion of the water from the natural stream, but an actual application of it to the soil, to constitute the constitutional appropriation recognized for irrigation."

It thus appears that the law of appropriation requires that the appropriator shall post a notice at the point of intended diversion, of the quantity of water claimed; he must make an actual diversion of the water and apply the water to a useful and beneficial purpose, which in the case of irrigation is an application of the water to the soil. In none of these requirements did plaintiff comply with the law in appropriating the current of the river. He did not notify the world that he made such a claim; he made no diversion of such water, and he did not apply it to the soil as required where the appropriation is for the purpose of irrigation. It is clear, therefore, that the current of the river was no part of plaintiff's water location and that he has no cause of action again the defendant for destroying this current. The claim of the plaintiff that the means of utiliz-
66 ing the current is attached as an appurtenance to the appropriation is likewise untenable. Sec. 3184 of the Revised Statutes of Idaho is referred to as supporting this claim. That section provides as follows: "All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel of, or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the last two sections." The permission here given is a mere license to the owner of lands adjacent to a stream to use any appropriate method for raising the water to a level above the banks for distribution upon such adjacent lands, but it is immaterial to the state what particular method is used. The land-owner may use a ram, a pump or a wheel, or he may raise the water by means of a ditch. And he may change from one method to another as the situation or circumstances may require. Charnock *v.* Higuerra, 111 Cal. 473, 476. The method adopted cannot be said to have attached as appurtenant to the appropriation as against other appropriators of water from the same stream. Perhaps in a conveyance of land having upon it or in the adjacent stream a ram or other machine for raising water from the river such a machine

would pass to the grantee of the lands under a deed containing the term "appurtenances," but that would be a very different
67 proposition from the one now under consideration. We are, therefore, of opinion that the means of utilizing the current is not attached as appurtenant to the appropriation.

There is, furthermore, the general principle that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. In Basey *v.* Gallagher, 20 Wall. 670, 683, the Supreme Court of the United States said: "Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual."

In Fitzpatrick *v.* Montgomery, 20 Mont. 181, 187, the Supreme Court of the State of Montana, after referring to what has been just quoted from Basey *v.* Gallagher, said: "While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the constitution to be a public use. (Constitution, Article 3, Section 15.) It is easy to see that, if persons by appropriating the waters of the streams of the state became the ab-
68 solute owners of the waters without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern states and territories have been to prevent such a monopoly of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water by appropriation."

It follows that, in our opinion, the complaint does not state facts sufficient to constitute a cause of action against the defendant. The judgment of the Circuit Court is, therefore, affirmed.

(Endorsed:) Opinion. Filed Feb. 3, 1908. F. D. Monckton, Clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWINN FALLS LAND & WATER COMPANY, Defendant in Error.

*Judgment U. S. Circuit Court of Appeals.*

In Error to the Circuit Court of the United States for the District of Idaho.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Idaho, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs to the defendant in error.

(Endorsed:) Judgment. Filed and entered. February 3, 1908. F. D. Monckton, Clerk.

70 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
*vs.*
TWINN FALLS LAND AND WATER COMPANY, a Corporation, Defendant in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighteen (18) pages, numbered from one (1) to eighteen (18), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, this twenty-second day of May, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

71 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Henry Schodde is plaintiff in error and Twin Falls Land & Water Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Idaho, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United

72 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred nine.

JAMES H. McKENNEY,
*Clerk of the Supreme Court*
*of the United States.*

73 [Endorsed:] File No. 21,379. Supreme Court of the United States. No. 583, October Term, 1909. Henry Schodde vs. Twin Falls Land & Water Co. Docketed No. 1380. United States Circuit Court of Appeals for the Ninth Circuit. Writ of certiorari. Filed Feb. 13, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

74 United States Circuit Court of Appeals for the Ninth Circuit.

HENRY SCHODDE, Plaintiff in Error,
vs.
TWIN FALLS LAND & WATER CO., Defendant in Error.

***Stipulation.***

Whereas, the Supreme Court of the United States did on the 21st day of January, 1909, on the petition and motion of the plaintiff in error, issue a writ of certiorari directed to the Judges of the above named court in the above entitled cause, commanding them to send to said Supreme Court the record and proceedings in said cause, and

Whereas, there is now on file with the clerk of said Supreme Court a transcript of the record and proceedings of said Circuit Court of Appeals in said cause, which said record and transcript is certified as true and correct by the clerk of said Circuit Court of Appeals,

Now therefore, it is stipulated by and between the parties hereto and their attorneys that the said record, filed in the office of the clerk of the Supreme Court of the United States on the 24th day of October, 1908, and docketed as No. 583, October Term, 1908, file number 21379, together with the petition for the writ of certiorari, filed in said cause with said clerk of the Supreme Court on or about the same day, be taken and deemed as the return to said writ of certiorari.

Dated January 29, 1909.

E. B. CRITCHLOW,
*Attorney for Def't in Error.*
HENDERSON, PIERCE,
CRITCHLOW & BARRETTE,
*Of Counsel.*

JOSEPH R. WEBSTER,
*Attorney for Plaintiff in Error.*
K. I. PERKY,
A. A. FRASER,
JOHN F. MACLANE,
*Of Counsel.*

75 (Endorsed:) No. 1380. United States Circuit Court of Appeals for the Ninth Circuit. Henry Schodde Plaintiff in Error, vs. Twin Falls Land & Water Co., Defendant in Error. Stipulation of Counsel Relative to Return to Writ of Certiorari. Filed Feb. 13, 1909. F. D. Monckton, Clerk.

76 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
vs.
TWIN FALLS LAND & WATER COMPANY, Defendant in Error.

*Certificate of Clerk, United States Circuit Court of Appeals, to Stipulation of Counsel Relative to Return to Writ of Certiorari.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding two (2) pages, numbered one (1) and two (2), respectively, to be a true copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," filed in the above-entitled cause on the 13th day of February, A. D. 1909, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 13th day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

77 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1380.

HENRY SCHODDE, Plaintiff in Error,
vs.
TWIN FALLS LAND & WATER COMPANY, Defendant in Error.

*Return to Writ of Certiorari.*

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed Writ of Certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

78 [Endorsed:] File No. 21,379. Supreme Court U. S. October Term, 1910. Term No. 84. Henry Schodde, Petitioner, vs. Twin Falls Land & Water Co. Writ of certiorari and return. Filed Feb'y 23d, 1909.

8

Office Supreme Court, U. S.
FILED.
DEC 19 1908
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States

OCTOBER TERM, 1908

No. 583

HENRY SCHODDE,
*Petitioner.*

v.

TWIN FALLS LAND AND WATER COMPANY,
*Respondent.*

2

*Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.*

JOSEPH R. WEBSTER,
*Attorney of Record for Petitioner.*
K. I. PERKY,
ALFRED A. FRASER and
JOHN F. MACLANE,
*Of Counsel.*

# Supreme Court of the United States

**OCTOBER TERM, 1908**

**No. 583**

HENRY SCHODDE,
*Petitioner.*

v.

TWIN FALLS LAND AND WATER COMPANY,
*Respondent.*

*Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Henry Schodde, shows unto your Honors the following facts:

I.

On the 24th day of July, 1905, your petitioner, Henry Schodde, a citizen of the State of Idaho, by his attorneys Hawley, Puckett and Hawley, filed his complaint in the District Court of Lincoln County, Idaho, against the defendant, Twin Falls Land and Water Co., a corporation organized under the laws of the State of Utah, wherein the plaintiff prayed judgment on three causes of action, for damages aggregating in amount the sum of $56,550. (Printed record pp. 1-7.)

II.

These three causes of action were substantially the same, except that they applied to different tracts of land, and the gist of each was that the plaintiff was the owner

of riparian lands located on Snake river in the State of Idaho; that he had appropriated and diverted a specified number of inches of the waters of said river, of which he had availed himself, and which he applied to his land, by means of wing dams constructed in the bed of the river, and water wheels built out from the land over the surface of the river, submerged to such an extent as to be propelled by the river's current, at that place naturally rapid. The defendant, so it was alleged, had constructed a dam across Snake River, below the lands of the plaintiff, which impounded, raised and caused to flow back the water to such an extent as to destroy the current on which the plaintiff's wheels depended for their revolution. The complaint also alleges that these wheels were the only means of raising water on to, and irrigating, the plaintiff's land, and damages are demanded for cutting off the water supply from the plaintiff's lands, and preventing the raising of crops thereon. (Printed record ib.)

III.

On the 23rd day of August, 1905, the defendant duly procured the removal of said cause to the Circuit Court of the United States for the District of Idaho, on the ground of the diverse citizenship of the parties (printed record pp. 8-11), and thereafter filed, in the latter court, a demurrer to each of the causes of action stated in the complaint, on the ground that they, and each of them, failed to state facts sufficient to constitute a cause of action. (Printed record p. 12.)

IV.

On the third day of May, 1906, the Circuit Court, District Judge Beatty presiding, sustained the defendant's demurrer, and gave judgment dismissing the cause. (Printed record p. 13.) The decision of the Court may be found in the printed record at pp. 14-17.

V.

A bill of exceptions was duly prepared, settled and allowed (printed record pp. 17-18), and a writ of error procured from the Circuit Court of Appeals of the Ninth Cir-

cuit (printed record pp. 20-24), to which return was duly made and the transcript filed and docketed as No. 1380, with the Clerk, on the 29th day of September, 1906.

VI.

Thereafter such proceedings were had that the cause was argued and submitted to the Circuit Court of Appeals, which afterwards, on the third day of February, 1908, delivered and filed its opinion in said cause, wherein it affirmed the judgment against your petitioner. (Printed record p. 32.)

VII.

The opinion of the Circuit Court of Appeals, when analyzed, involves four propositions, which are stated and answered in the following language:

1. "The claim that the right to the current of the river is appurtenant to the water location is contrary to well established principles of common law governing such a relation. The water location was an appropriation and diversion of a certain quantity of flowing water of the stream. The current of the river is part of the stream. There can be no right to the current of the stream as appurtenant to the diversion of the flowing water of the stream. The two rights in such case would be equal and of the same character and quality, and one such right cannot properly be appurtenant to the other". (Printed record pp. 28-29.)

2. "But aside from this rule of common law, which we think denies the right of an appropriator to claim the current of the stream as appurtenant to his water location, the law of appropriation is itself opposed to such a claim". (Printed record pp.....). The opinion then proceeds to set forth the provisions of the Constitution and Statutes of Idaho which prescribe the method of procedure required to acquire the right to the use of water, by posting and recording notices, and, after citing cases, continues, "It thus appears that the law of appropriation requires that the appropriator shall post a notice at the point of intended diversion, of the quantity of water claimed; he must make

an actual diversion of the water and apply the water to a useful and beneficial purpose, which in the case of irrigation is an application of the water to the soil. In none of these requirements did plaintiff comply with the law in appropriating the current of the river. He did not notify the world that he made such a claim; he made no diversion of such water and he did not apply it to the soil as required when the appropriation is for irrigation. It is clear, therefore, that the current of the river was no part of plaintiff's water location, and that he has no cause of action against the defendant for destroying this current". Printed record p. 29.)

3. "The claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is likewise untenable. Section 3184 of the Revised Statutes of Idaho is referred to as supporting his claim. That section provides as follows 'All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel of, or upon the banks or margin of the same, rams or other machines for the purpose of raising the water thereof to a level above the banks, requisite for the flow thereof, to and upon such adjacent lands; * * *'. The permission here given is a mere license to the owner of lands adjacent to a stream to use any appropriate method for raising the water to a level above the banks for distributing upon such adjacent lands, but it is immaterial to the state what particular method is used. * * * The method adopted cannot be said to have attached as an appurtenance to the appropriation, as against other appropriators of water from the same stream". (Printed record p. 30.)

4. "There is furthermore, the general principle that the right to appropriate must be exercised with some regards to the rights of the public. It is not an unrestricted right". (Printed record p. 31.) The opinion then cites cases and the inference implied, if not expressed, is, as we understand it, that in view of the small area of between 400 and 500 acres watered by the plaintiff's wheels and the

thousands of acres supplied through the defendant's canals, that the plaintiff's appropriation, though prior in time, must be subordinated for the public good, to that of defendant.

VIII.

A certified copy of the entire record of said cause in the Circuit Court of Appeals for the Ninth Circuit, is herewith furnished and made a part of this application, marked exhibit "A", in conformity with Rule 37 of this Honorable Court.

IX.

Your petitioner is informed and believes that the opinion of the Honorable Circuit Court of Appeals of the Ninth Circuit is erroneous in the following particulars:

1. Wherein it holds that the right to the current of the river is not appurtenant to the plaintiff's water location.

2. Wherein it holds that the current of the river was not a part of plaintff's water location, and that the plaintiff has no cause of action against the defendant for destroying such current.

3. Wherein it holds that the means of utilizing the current is not attached as an appurtenance in the appropriation, and that the statutory authority for the plaintiff's wheels was a mere license.

4. Wherein it holds or infers that the relative magnitude of works of the plaintiff and of the defendant in any wise affects or impairs the prior rights of the plaintiff, if any, to the current of the stream.

X.

As grounds for the extraordinary interposition of this Court by its Writ of Certiorari, your petitioner avers:

1. That the main question involved, viz: Does a riparian appropriator of water acquire, by the utilization of the current of the stream on which his land abuts, any vested right to the natural flow of such current? is one of great importance to the whole arid portion of the United States. The opinion of the Circuit Court of Appeals in this

case is the first authoritative announcement of any court on this question, in its application to the arid States, and in legal effect it destroys the availability of the streams of the west for power purposes. It further authorizes the destruction, without compensation, of all irrigation works depending on the natural flow of the stream for the power by which the water appropriated is diverted and carried on to the land.

2. The opinion of the Circuit Court of Appeals, while determining a new question, ignores the established doctrine of the common law, and the decisions of the courts of the older States of the country, based thereon, which is best expressed in the old maxim: *"Aqua currit et debet currere ut currere solebat"*. No reference whatever is made to the long line of cases, illustrations of which are given in the accompanying brief, recognizing and protecting the rights of riparian proprietors, who have constructed water wheels, mills and power plants, to utilize the current of the stream.

3. The decision conflicts in principle with a later decision of the Supreme Court of Idaho which holds that a riparian owner of land bordering on the Snake River takes title to the thread of the stream. *Johnson v. Johnson 95 Pac. Rep. 499*;not yet officially reported. This being the law of Idaho, the current which was destroyed by this defendant flowed over the plaintiff's own land, and was appurtenant to that land. See *Hill v. Newman 5 Cal. 445*; *Farmer v. Ukiah Water Co. 56 Cal. 11*; *Lower Kings River Water Co. v. Kings River Canal Co. 60 Cal. 408*; *Chauvet v. Hill, 28 Pac. Rep. (Cal.) 1066*. The decision in this case, wherein it holds that the current or flow of the river is not appurtenant to the plaintiff's water location, in effect ignores these decisions, for if the current is appurtenant to the land, the plaintiff's right thereto is complete even if it is not appurtenant to the water location.

4. The decision of the Circuit Court of Appeals conflicts, in the following particulars, with the statute law and decisions of the Supreme Court of Idaho:

(a) Wherein it holds that it is necessary, in order to constitute a current appropriation, that the posted and re-

corded notice need state that it is intended to appropriate the current, the decision is in direct conflict with *Sandpoint Water and Light Co. v. Panhandle Development Co. 11 Idaho 405*, which holds that a valid appropriation may be made without posting or recording a notice, by actual diversion and application to beneficial use.

(b) Wherein it holds that the right accorded riparian proprietors, by Section 3184 of the Revised Statutes of Idaho, to place rams and other machines in the river for the purpose of raising the water to a level above the banks, confers a mere license which gives no right against other appropriators, the decision emasculates the statute and makes the right thereby conferred a hollow mockery.

(c) The decision ignores the doctrine of riparian rights, which, while declared inoperative as against the doctrine of appropriation in *Drake v. Earhart 2 Idaho 750*, is accorded some recognition in the later case of *Johnson v. Johnson, 95 Pac. Rep. 499*. In the case at bar, the plaintiff, a riparian proprietor, owning the land on both sides of the Snake River and therefore the bed of the river, had perfected a right to the water by appropriation, and utilized the natural flow of the current over his own land to make his appropriation effectual, prior to the initiation of the rights of the defendant. Other decisions of the Supreme Court of Idaho, while in no sense involving the questions here considered, seem to recognize the right of an appropriator to have the waters of the stream flow to the established point of diversion to supply his right. *Moe v. Harger 10 Idaho 302*; *Van Camp v. Emery 13 Idaho 202*.

(d) The decision intimates, if it does not expressly hold, that the relative public importance of the irrigation works of the respective parties is to be considered in determining their rights—the greatest good to the greatest number—whereas the Supreme Court of Idaho recognizes the right established by priority of appropriation as an absolute right, to be protected and enforced, "even if harsh and unjust." *Kirk v. Bartholomew, 3 Ida. 367*.

5. The decision ignores the fact pleaded in the complaint that the dams and wheels of the plaintiff constituted

the only means by which he could utilize his appropriation, and that by the construction of the current it has become impossible for the plaintiff to irrigate his lands or to raise crops thereon. It thus sanctions the taking of private property for public use in violation of the Constitutions of Idaho and of the United States, and permits a private corporation to do, what even a sovereign State cannot authorize, viz: to deprive a person of his property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of, and under the seal of, this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court on a date to be therein designated, a full and complete transcript of the record of said Circuit Court of Appeals in said cause therein entitled "Henry Schodde, Plaintiff in Error v. Twin Falls Land and Water Company, Defendant in Error. Number 1380," to the end that the said cause may be reviewed and determined by this Court under and pursuant to Section 6 of the Act of Congess entitled "An act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3d, 1891; and that the said judgment of the said Circuit Court of Appeals in the said cause, and every part thereof, may be reversed by this Honorable Court, and that the judgment of the Circuit Court for the District of Idaho be reversed with the direction that further proceedings shall be had in accordance with the decision of this Honorable Court.

And your petitioner will ever pray.

JOSEPH R. WEBSTER,
*Attorney of Record for Petitioner.*
K. I. PERKY,
ALFRED A. FRASER, and
JOHN F. MACLANE,
*of Counsel.*

STATE OF IDAHO, }
COUNTY OF LINCOLN, } ss.

Henry Schodde being first duly sworn deposes and says, that he is the petitioner named in the foregoing petition for writ of certiorari, that he has read said petition, knows the contents thereof, and that the same is true of his own knowledge except such matters as are therein stated to be on his information or belief, and as to those matters, that he believes it to be true.

HENRY SCHODDE.

Subscribed and sworn to before me this 17th day of October, 1908.

(Notarial Seal.)

FRANK M. SNYDER,
Notary Public.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that, in my opinion, the same is well founded, and the case is one in which the prayer of the petitioner should be granted by this Honorable Court.

JOHN F. MACLANE,
*Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1908.**

No. 583.

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HENRY SCHODDE,
*Petitioner.*

v.

TWIN FALLS LAND AND WATER COMPANY,
*Respondent.*

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**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.**

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## STATEMENT OF THE CASE.

This action was brought by the petitioner as plaintiff against the respondent as defendant in the district court of Lincoln County, Idaho, on the 24th day of July, 1905. (Printed record, pp. 1-7.) The defendant procured the removal of the cause to the United States Circuit Court for the District of Idaho on the ground of the diverse citizenship of the parties, the plaintiff being a citizen of the State of Idaho and the defendant a corporation organized under the laws of the State of Utah. (Printed record p. 9.) The formal proceedings in the cause are stated in the foregoing petition, and need not be repeated here further than to say that a demurrer was sustained to the complaint, judgment of dismissal was entered, a writ of error was procured from the Circuit Court of Appeals for the Ninth Circuit, which after hearing, sustained the judgment of the lower court. It is to procure a review of the judgment and decision of the Circuit Court of Appeals that a certiorari is herein applied for.

The facts as shown by the complaint, which sets forth three causes of action all substantially the same except that

they apply to different tracts of land, are that the plaintiff and his predecessors in interest, in two cases in 1889, and in the third case in 1895, made an appropriation of certain of the waters of Snake River for mining and agricultural purposes, and in order to apply the water appropriated to his lands, which are riparian in character and abut on the Snake River, constructed wing dams and water wheels in and over the bed of the river in such a manner that the dams deflected the current to the wheels, which were thereby caused to revolve and caught up the water by means of buckets and carried it to a flume by means of which it was distributed on to the plaintiff's lands. (Printed record, p. 2.) The current of the river at the place where this diversion was made was naturally rapid, and afforded ample power for the movement of the wheels. (Printed record p. 2.) These dams and wheels constructed by the plaintiff aggregated in cost something over $20,000. The figures are given in various places throughout the complaint. The plaintiff and his predecessors in interest continued to use the water of the river and to apply them by means of the power afforded by the current to their lands, until 1905, in which year the defendant constructed a dam across the Snake River below the lands of the plaintiff and, closing down the dam, impounded the waters of the river, causing them to rise and flow back and ultimately to become stationary so that the current was destroyed, and its availability for power purposes ceased. (Printed record p. 3.) The complaint further alleged that there are no other means by which the plaintiff can avail himself of his appropriation, and that his land had ceased to become profitable, and no crops can be raised thereon. (Printed record p. 3.) The trial court and the Circuit Court of Appeals both held in effect that the plaintiff had no property right in the current of the stream either as an appurtenance to his property or as part thereof, and that the acts of the defendant were *damnum absque injuria.*

## SPECIFICATION OF ERRORS OR POINTS RELIED ON FOR CERTIORARI.

The alleged errors in the opinion or decision of the Circuit Court of Appeals, and the grounds for the issuance of a writ of certiorari, are fully stated in the petition preceding this brief. As the argument on this application must be directed primarily to the grounds for certiorari, they are here stated concisely as follows:

1. The question involved, viz: Does a riparian proprietor of water acquire, by the utilization of the current of the stream on which his land abuts, any vested right to the natural flow of such current? is of great importance to the whole arid portion of the United States. It involves, incidentally, the question whether the doctrine of riparian rights is of any effect whatever in those States which have repudiated that doctrine where it conflicts with the law of appropriation. It involves the further question as to whether there can be an appropriation of the waters of the West for power purposes, where the power is dependent on the current of the stream. This question, so far as we have been able to discover, has never before been passed upon by a court of last resort.

2. The opinion of the Circuit Court of Appeals ignores the established doctrine of the common law and the decisions of the courts of the older States, based thereon, which recognizes a right to the continuance of the flow of a stream in its natural condition.

3. The decision conflicts in principle with a later decision of the Supreme Court of Idaho under which a riparian owner takes title to the thread of the stream, and conflicts with decisions of the Supreme Court of California holding that the current of a stream is appurtenant to the land over which it flows.

4. The decision is in conflict with the statutory law and the decisions of the Supreme Court of Idaho.

5. The decision sanctions the taking of private property for public use in violation of the Constitutions of Idaho and of the United States and in effect permits the defendant to deprive the plaintiff of his property without due process of law.

## ARGUMENT.

We approach the discussion of this cause with a full consciousness of the reluctance with which this Court exercises its authority to issue a writ of certiorari to bring up for review a decision of the Circuit Court of Appeals of the class made final by the Judiciary Act of 1891. We realize that the primary question is not whether the Circuit Court of Appeals erred in its decision, or mis-applied the law, but it is rather whether the question involved is of sufficient importance to warrant a review by the Supreme Court. This proposition is discussed at length, and the rule stated in *Forsyth v. Hammond, 166 U. S. 504 (41 L. Ed. 1095)*. This Court, speaking through Mr. Justice Brewer, there said: "We reaffirm in this case the propositions heretofore announced, to wit: that the power of this Court in certiorari extends to every case pending in the Circuit Courts of Appeal and may be exercised at any time during such pendency, providing the case is one which, but for this provision of the statute, would be finally determined in that court. And further, that while this power is co-extensive with all possible necessities, and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and the courts of a State, or some matter affecting the interest of this nation in its internal or external relations demands such exercise."

As we understand the rule, the question of whether or not the Circuit Court of Appeals erred in its decision, is involved at this stage of the proceedings only to the extent that such a probability of error should be shown as would justify this Court in taking cognizance of the cause on the merits. In other words, there would be no need of a review where the decision of the Circuit Court of Appeals is so obviously right as to be beyond question. But on the other hand, if there is a new, fairly debatable question involved, of such importance to the interests of the country

at large as to require a final and authoritative decision, we think that this Court will, in its discretion, take jurisdiction although it may afterwards decide on the merits that the Circuit Court of Appeals was right. This brief, then, will be directed primarily to a consideration of the reasons why this Court should take cognizance of the cause, and we shall endeavor incidentally to show a sufficient probability of error in the decision of the Circuit Court of Appeals to demonstrate that the questions involved are fairly debatable and worthy of authoritative adjudication for all the States and circuits.

*The Importance and Novelty of the Question Involved.*

It may be that we, as counsel, are obsessed of an idea of importance which this cause does not in fact contain, but it seems to us that the decision of the Circuit Court of Appeals has a wider and more far reaching effect than any cause which has been decided by that Court for some time. It is well known that the arid West is supplied with a number of large and important streams, of which the Snake River is one, which are generally useless for navigation but are of immense value to the country which they traverse by reason of their possibilities for irrigation and power purposes. The current of these streams is naturally swift because of the high percentage of fall in their beds. At the present time, there are, in contemplation and in course of actual construction, in the State of Idaho, a number of great power schemes which are to depend on the flow of the current of Snake River. The decision of the Circuit Court of Appeals, as we read it, absolutely denies the validity of an appropriation for power purposes of the current of a stream. In this connection it should be remembered that while the plaintiff used the water which he diverted on to his land, principally for the purpose of irrigation, he used the current solely as a means of furnishing the power by which his wheels were revolved and the water was taken from the river and applied to the land.

That the effect of this decision is to completely deny the validity of any current appropriation for power purposes,

seems clear to our mind from the facts of the case. If any current appropriation can be made, the plaintiff made such an appropriation. In 1889 and in 1895 when the appropriation of the current was made, if made at all, the Idaho statutes on the subject of irrigation provided in effect for the posting and recording of a notice of appropriation, and the diligent and uninterrupted commencement and prosecution of the construction of the necessary diversion works. *Revised Statutes, 1887 Sections 3160, 3161.* Substantially similar provisions are contained in the appropriation act of 1895, *Laws 1895 174.* It is the universal rule of the arid States, expressly adopted by the Supreme Court of Idaho, that a valid appropriation is made, under statutes requiring the posting and recording of notice, by the actual construction of irrigation works and the application of the water to a beneficial use, without posting or recording the notice. The only difference between an appropriation made by actual diversion, and one made by posting and recording, is that in the latter case the right acquired relates back to the date of posting and recording, while in the former, the right dates from the actual completion of the works, and the application of the water to the land. *Sand Point Water and Light Company v. Panhandle Development Company, 11 Idaho 405.* See also *Farnham "Waters and Water Rights," Vol III, pp. 2055-2057, Sections 663, 664.* Consequently, it is immaterial whether or not the plaintiff's notice of appropriation contained a statement of his intent to appropriate the current, or, in fact, whether he posted and recorded any notice at all, if he actually appropriated and applied the current to a beneficial use. It is clear that he appropriated the current and constructed works to complete such appropriation, for he built wing dams in the bed of the river which deflected the current from its natural channel or course to the wheels which he had constructed, and for at least ten years he had beneficially applied the current to the use of turning his wheels. The actual cost of the works used to appropriate and apply this current to a beneficial use, was over $20,000. It is impossible to conceive what else could be done towards com-

pleting a current appropriation. Therefore we contend that if the validity of this appropriation by the plaintiff be denied, no current appropriation can be made, and the millions of horse power latent in the waters of the West are a practical waste.

We think that this fact is of itself sufficient to authorize this Court to review and carefully scrutinize the decisions of the Circuit Court of Appeals and to determine on reason and in the light of authority, whether such decision is, or is not, the law of the land.

In support of the novelty of the questions presented, we think it is sufficient to call the attention of the Court to the language of District Judge Beatty in sustaining the demurrer. His opinion is found in the transcript of the record used in the Circuit Court of Appeals, and in its course, he uses the following language:

> "Defendant admits in argument that plaintiff is entitled to the water he actually appropriated and diverted to his lands for use thereon, but denies that he is entitled to his claim for protection to his said water wheels, or his claim that the river must be left in such stage of water that they may be operated as formerly. Accustomed as we are in this water country to the free and almost unlimited appropriation and use of any of Nature's products, and to be protected therein under the law that he who is first in time is first in right, this proposition at first seems an innovation. It is, however, worthy of most careful investigation. It is, so far as I am advised, entirely new and has never been directly discussed or decided by any court." (Printed record, p 14.)

In addition to this statement of the learned district judge, we would add that no case in direct support of the contentions of either the plaintiff or the defendant was cited by any of the distinguished counsel representing the respective parties in the Circuit Court and the Circuit Court of Appeals, and the writers of this brief, who have been retained since the decision of the Circuit Court of

Appeals, for the purpose of making this application, have been unable, in a careful search and review covering over three hundred cases, and all the available digests, cyclopedias and text books, to find any case directly in point on either side of the proposition.

*The Opinion of the Circuit Court of Appeals Ignores the Established Doctrine of the Common Law as to Running Water.*

It is an established maxim of the common law: "*Aqua currit et debet currere ut currere solebat.*" This maxim is a part of, or rather epitomizes, the doctrine of riparian rights. Based on the principle therein expressed, numerous cases have been decided by the Federal and State courts which establish and recognize the right of a riparian owner to the continued flow of the natural current of a stream on which his land abuts, where he has made some use, or as it is often termed, "appropriation", of such current by the erection of mills, wheels or like appliances. The decision of the Circuit Court of Appeals, like that of the Circuit Court, simply ignores this principle and the decisions based thereon. If, as contended above, this case presents a question which is *res nova,* we think that this principle and these cases should at least be considered in determining the questions involved.

It is probable that the Circuit Court of Appeals assumed that the doctrine of riparian rights has no place at all in the jurisprudence of Idaho, and that therefore, the cases based on that doctrine are without application to the case at bar. But we think that this assumption is gratuitous and unfounded. We are thus brought to consider the important question whether the doctrine of riparian rights is of any validity in those States which have adopted the law of appropriation.

*Sec. 18 of the Revised Statutes of Idaho (1887) provides:* "The common law of England so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these Revised Statutes, is the rule of decision in all the courts of this

State." The Supreme Court of Idaho in *Drake v. Earhart 2 Ida. (Hasb.) 750,* held, that

> "A riparian proprietor whose claim to the use of water of a stream flowing through his land is not based upon appropriation of it under the Territorial laws, is inferior to that of a prior appropriator." (Quoting from syllabus.) The facts of the case were that the plaintiffs claimed as appropriators, while the defendant based his claim to the use of the waters of the stream solely on his standing as a riparian proprietor. "His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows, by its natural channel, through his land; hence that he is entitled to the use thereof, allowed by the common law."

The court simply holds that the rights of the prior appropriator must prevail over those of a mere riparian owner who has made no appropriation. In the case at bar, the plaintiff was not only a riparian owner, but he had made what is admitted to have been a valid appropriation of the waters of Snake River, prior to the appropriation made by the defendant. The question is thus squarely presented, Does not a riparian owner, who has perfected a right to the use of water from the stream, under the law of appropriation, acquire a right to the continued flow thereof under the common law doctrine of riparian rights, when such use is necessary to make his appropriation available, as against a subsequent appropriator?

The doctrine of appropriation has always been based on the law of necessity and on the inapplicability of the contrary doctrine to the arid States, and such is the basis on which it is recognized by the Supreme Court of Idaho in the case above cited. There is an interesting discussion of this question by the Supreme Court of California in *Hill v. Smith, 27 Cal. 476.* The court, speaking through Chief Justice Sanderson, say, on p. 482 of the opinion:

> "This is due in a great measure doubtless to the notion, which has become quite prevalent, that the rules

of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the ground work of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim *sic utere tuo ut alienum non laedas*, upon which they are grounded, has lost none of its governing force; on the contrary it remains now, and in the mining regions of this State, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of the stream flow in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to his land and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned upon which the rule is founded is equally as applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights of a like use by the other. This maxim is one which every riparian proprietor is bound to respect, and it is no less obligatory upon those who use and divert water for mining purposes. So that in all controversies like the present, the question to be determined after all is the same as that presented by a like controversy between riparian proprietors, to wit: Has

> the plaintiff's use and enjoyment of the water for the purposes for which he claims its use been impaired by the acts of the defendant?"

In other words, as we understand the decision, it holds that the doctrine of riparian rights is still in force so far as applicable to the conditions of the arid States but is modified by those conditions, where they differ from the conditions which gave rise to that doctrine in its entirety. We are not unmindful that California still maintains in a larger degree the common law of riparian rights than do most of the arid States, but it will be noticed that in *Drake v. Earhart, supra,* the Supreme Court of Idaho bases its decision on California authorities. Further that this language was approvingly quoted by the Supreme Court of New Mexico in the case of *Trambley v. Luterman, 27 Pac. Rep. 312, (Loc. Cit. 315)* in which that court recognized and established the law of appropriation as against that of riparian rights.

In *United States v. Rio Grande Dam and Irrigation Company, 174 U. S. 690 (L. Ed. 1136)* this Court said (p. 704):

> "In extending the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common law rule and justified an appropriation of flowing water both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States by custom and by State legislation, a different rule—a rule which permits under certain circumstances the appropriation of the waters of a stream for other than domestic purposes."

This rule is stated in contradistinction to the rule of common law, which as stated on p. 702 of the opinion, quoting from Chancellor Kent, is as follows:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his land as it was wont to run without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a right to divert it or a title to some exclusive enjoyment. He has no property in the water itself but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat,* is the language of the law. Though he may use the water while it runs over his land as an incident of the land, he cannot unreasonably detain it or give it another direction and he must return it to its ordinary channel when it leaves his estate."

Other cases establishing the law of appropriation as superior to the law of riparian rights might be cited, but we think it safe to affirm that in every such case, the only question presented or decided was the validity of a prior appropriation as against a claim of mere riparian ownership, and that in no case has it been decided or even intimated, that a riparian proprietor who has perfected his right under the law of appropriation may not demand the protection of his common law right to the continuance of the flow of the stream, where such continuance is a necessary incident to the enjoyment of his appropriation. We further believe that the reason for the law of appropriation does not demand any such departure from the common law as to require a denial of all right to the continued flow of the current, but that, as applied to the case at bar, a right to such continued flow is absolutely essential to the full enjoyment of the right conferred by appropriation.

Conceding, then, to us, that we have fairly established that the law of riparian rights is in force in so far as it defines the right to the current of a stream when appropriation and use thereof have been made, let us glance for a moment at some of the common law cases recognizing and establishing the right to the continued flow of the current of a stream where the same has been put to a practical

use. Mr. Justice Story, sitting in circuit for the District of Rhode Island, said:

> "Prima facie, every proprietor upon each bank of a river is entitled to the land covered with water in front of his land to the middle thread of the stream.* * * In virtue of this ownership he has a right to the use of the waters flowing over it in its natural current, without diminution or obstruction." *Tyler v. Wilkinson, 4 Mason* 397; Reported in *Fed Cas.* No. 14312.

Note in this connection that in *Johnson v. Johnson, 95 Pac. Rep. 499,* the Supreme Court of Idaho recognized the title of the riparian proprietor as extending to the center of the stream, and it is this fact which is said by Justice Story to give the right to the current.

> "A riparian proprietor has a right to have the water flow in its natural current without any obstructions injurious to him over the whole extent of his land."
> Heath v. Williams, 43 Am. Dec. (Me.) 265.

> "The general doctrine relating to water courses is, that every proprietor is entitled to the use of the flow of the water in its natural course, and to the momentum of its fall on his own land."
> Weiss v. Oregon Iron and Steel Company, 11 Pac. Rep. (Ore.) 455.

> "As to the nature of the right of the riparian owner in the water, by all the modern as well as ancient authorities, the right in the water is usufructory and thus not so much in the fluid itself as in its uses, including the benefits arising from its momentum or impetus."
> Lux v. Haggin, 10 Pac. Rep. (Cal.) loc. cit. 753.

> "It involves the relative rights of riparian proprietors on the same stream * * * as it passes through their respective lands, to the use of the power of such current for hydraulic purposes. These rights depend mainly upon the rules and principles of the common

law. * * * This rule is that every proprietor of land through which a water course runs, has a right to the use of the impelling force of the current for mill purposes, so far as they exist on his own land. * * * Before any mills are erected, the right of each proprietor is the same; it is a right to appropriate the power of the stream by the actual erection of a mill."

Shaw, C. J., in Gould v. Boston Duck Company, 79 Mass. (13 Gray) 442.

"A prior occupancy of the stream is considered an appropriation of it; and if such an appropriation be made, as if for instance a mill be erected on a stream not before occupied, the person so making the appropriation may acquire rights by it, as against the riparian proprietor."

Shreve v. Voorhus 3 N. J. Eq. 25.

The authorities on this subject might be multiplied indefinitely but enough has been said to show that the common law not only recognized the right of a riparian proprietor to the current of the stream but also the right to appropriate such current by actually applying it to a beneficial use. We think it will be conceded that had the plaintiff's power wheels been erected in any State of the Union east of the Missouri River, he would have been entitled to the continued flow of the current which he had appropriated. And we think that in the absence of authority to the contrary, he should not be denied that right merely because his appropriation was made in one of the arid States. In any event, we believe that the question is fairly open and debatable, and is of sufficient general importance to justify us in asking that it be determined by this Court.

*The Decision Conflicts in Principle With a Later Decision of the Supreme Court of Idaho and Consequently With Certain California Decisions.*

Conflict of decision with decisions of State courts in the same circuit, is given as one of the grounds for the issuance of a writ of certiorari in *Forsyth v. Hammond, supra*;

and we think such conflict exists in this case. In *Johnson v. Johnson, 95 Pac. Rep. 499,* decided a few months after the decision in this cause was rendered, the Supreme Court of Idaho so far recognized the doctrine of riparian rights as to hold that a riparian owner whose land abutted on a navigable stream took title to the thread of the stream. The Circuit Court of Appeals was not, of course, at fault, in not anticipating a decision which had not been rendered at the time they wrote their opinion. But in theory at least, the Johnson case merely announced the pre-existing law, and if this fact has any bearing on the case at bar, the plaintiff should be entitled to the benefit thereof. Under this decision, the current which the defendant destroyed flowed over the plaintiff's own land and was appurtenant to that land.

See Hill v. Newman, 5 Cal. 445;
Farmer v. Ukiah Water Company, 56 Cal. 11;
Lower Kings River Water Company v. Kings River Canal Company, 60 Cal. 408;
Chauvet v. Hill, 28 Pac. Rep. (Cal.) 1066.

The decision in this case wherein it holds that the current or flow of the river is not appurtenant to the plaintiff's water location, in effect ignores these decisions, for if the current is appurtenant to the land, the plaintiff's right thereto is complete whether or not it is appurtenant to the water location.

*The Decision Conflicts With the Statute Law and Decisions of the Supreme Court of Idaho.*

Under this head, four specifications of conflict are made in the petition. These will be considered in their order.

(a) The holding that it is necessary, in order to constitute a current appropriation, that the posted and recorded notice state an intent to appropriate the current, conflicts squarely with *Sand Point Water and Light Company v. Panhandle Development Company, 11 Idaho 405,* which holds that a valid appropriation may be made without posting or recording a notice, by an actual diversion and appli-

cation to beneficial use. This question has been previously discussed in this brief and need not be further commented on here.

(b) *Idaho Revised Statutes (1887) Section 3184* provides:

> "All persons, companies and corporations, owning or having the possessory title or right to lands adjacent to any stream, have a right to place in the channel of, or upon the banks or margins of the same, rams or other machines for the purpose of raising the waters thereof to a level upon the banks, requisite to the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others for conducting said waters, may be acquired in the manner prescribed in the last two sections".

The Court of Appeals in its opinion (printed record p. 30) says:

> "The permission here given is a mere license to the owner of lands adjacent to a stream to use any appropriate method for raising the water to a level above the banks for distribution upon such adjacent lands, but it is immaterial to the State what particular method is used. The land owner may use a ram, a pump or a wheel or he may raise the water by means of a ditch, and he may change from one method to another as the situation or circumstances may require. The method adopted cannot be said to have attached as appurtenant to the appropriation as against the appropriators of water from the same stream".

We think that this construction of the Statute is tantamount to ignoring it altogether. We submit that a mere permissive right to erect rams or water wheels in the stream would exist independent of statute. It is certainly a privelege which has been exercised both under the common law under the law of appropriation for time immemorial. And we think it would require no great amount of historical research to show that it is a privilege which has been exercised by riparian proprietors in all nations

and at all times and under all systems of law. It would certainly seem a work of supererogation for the legislature to grant, by a solemn statutory enactment, a mere permission which has always existed independent of statute.

This construction of the statute further ignores the concluding clause which authorizes the condemnation of adjacent lands for ditches to conduct water from the point at which the wheel or other elevating device is placed. Would it not be absurd for the legislature to authorize the construction of an expensive device for elevating water above the banks of a stream and the condemnation of land belonging to other and disinterested parties, for the distribution of the water, and then to permit the absolute destruction of all these works and the waste of the land dependent thereon for its water supply, without any compensation or redress?

But further, the decision ignores the principles so often announced that a license such as this, when acted upon and so to speak executed, becomes irrevocable on the part of the grantor and ripens into a right on behalf of the grantee. And conceding that the statutory right amounted to a mere license as against the grantor, does it follow that a third person can interfere with the enjoyment of the license while it is still unrevoked? We recall no case in which it has been so held.

(c) The decision ignores the doctrine of riparian rights. This matter has been so fully discussed in the earlier pages of this brief that it is restated here only for the form of emphasis under this assignment. We have already called attention to the case of *Johnson v. Johnson, 95 Pac. Rep. 499*, in which the Supreme Court of Idaho recognizes the doctrine of riparian rights in so far as it establishes title in the riparian proprietor to the bed of the stream. We have previously called attention to the fact that the common law doctrine of right to the current is a corollary of the riparian owner's title to the bed and banks of the stream. If this be so, the Johnson case is an authority in support of the plaintiff's position in the case at bar, and the decision of the Circuit Court of Appeals is in implied conflict with that case.

We called attention in the petition under this assignment to the cases of *Moe v. Harger, 10 Idaho 302,* and *Van Camp v. Emery, 13 Idaho, 202.* We do not claim that either of these decisions are in point but we do affirm that they are the only decisions by the Supreme Court of Idaho which hint at the question involved. In the former case the court say, (page 307):

> "So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappopriated water flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief."

In the latter case it is said, (p. 208):

> "If the defendant who lives above plaintiff is entitled to a priority for 45 inches of water, he may unquestionably divert that quantity, but when he has once done so, he may not dam the stream below or *hinder or impede the flow of the remaining stream* to the plaintiff's headgate." (The italics are ours.)

The first of these cases gives the prior appropriator a right to water sufficient to supply his right at his point of diversion. In the case at bar the thing which is essential to supply the right of the plaintiff at his point of diversion is the current of the stream. The second case protects the right of the appropriator to the unretarded flow of the stream. While we disclaim any assertion that these cases meet the exigencies of the case at bar, we think that as announcements of the Supreme Court of Idaho, they are entitled to consideration in the determination by the Federal courts of a case involving Idaho property rights.

(d) If we understand the *rationale* of the concluding paragraphs of the opinion, they imply that the relative public importance of the works of the plaintiff to those of the defendant is a matter to be considered in determining the rights of the parties. In this respect we think the decision of the Circuit Court of Appeals conflicts with that of the Supreme Court of Idaho in *Kirk v. Bartholomew, 3 Ida. 367,*

in which the right acquired by priority of appropriation is said to be enforcible "even if harsh and unjust." In that case the court tried to distribute the waters of the stream in such manner as to do the most good to the whole community, regardless of priorities among appropriators. In the case at bar the effect of the decision is to subordinate, or rather to destroy, the right of the plaintiff in order that the defendant may be able to supply its great army of water users and the public at large be benefited.

We feel that in discussing this point we are very close to the *raison d'etre* of the decision of both the Circuit Court and the Court of Appeals. It is an old adage that hard cases make hard law, and we think from a certain standpoint that this is one of those cases; but unlike all of the hard cases which have preceded it, the existing decision takes away the plaintiff's one ewe lamb in the service of the great king. At the time that this suit was brought, the Twin Falls Land and Water Company had just completed its vast irrigation works. The success or failure of the scheme hung in the balance. The consequences to that company of an adverse decision would have been momentous, as it was impossible to conjecture how many similar suits might be brought against the company for the destruction of water wheels and similar appliances both above and below the defendant's dam. It would have impaired the security felt by settlers and contemplating purchasers of water rights from the defendant and the progress of the whole country would have been stayed. The trial judge was very naturally impressed with these considerations and his whole opinion is directed to a consideration of the public importance of the defendant's works and similar works in actual process of construction or in contemplation. Thus the opinion reads in part:

> "Snake River is one of the largest streams of the country, carrying an immense volume of water through an arid but fertile land, susceptible of the highest cultivation through the use of these waters and thus of providing homes for thousands of people. Already throughout the great tract of land under the defend-

> ant's irrigating system, active towns are springing up; the entire landscape is dotted with the humble abodes of the home builders; everywhere life, vigor and hope prevail, and it is not the mirage of the desert where phantom groves and lakes and palaces delight the eye, but it is the certain progress of a prosperous civilization evolving from past desolation."

In view of these considerations, it was thought more fitting and proper that the humble acres of the plaintiff should revolve into their pristine state of desolation, and hence the decision.

While the Circuit Court of Appeals does not place its decision on the same grounds, yet its concluding paragraphs are worthy of note in that they indicate an adoption of the views of Judge Beatty.

We think that it was perfectly natural for the lower courts to take these views, and in so far as courts are to meet new conditions and to establish new principles with an eye to the well being of society, it was perfectly proper to take them into consideration and to defer to them if found controlling. But we believe that they completely overlooked the complete protection accorded to the defendant and its works under the law of eminent domain. In this connection we call attention to provisions of the Idaho Constitution and statutes. The Constitution provides, *Art. 1, Section 14*:

> "The necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation or for the right of way for the construction of canals, ditches, flumes or pipes to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage * * * or any other use necessary to the complete development of the material resources of the State or for the preservation of the health of its inhabitants, is hereby declared to be a public use. * * * Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, be paid therefor."

*Article 15, Section 3*:

> " * * * Priority of appropriation is given the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of those desiring the use of same, those using the water for domestic purposes shall, (subject to such limitations as may be prescribed by law,) have the preference over those claiming it for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. * * * But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in Section 14 of Article 1, of this Constitution."

*Revised Statutes 1887, Section 5212*, provides that property already appropriated to public use may be taken by condemnation proceedings, "But such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated." *Section 5213*: "Before property can be taken, it must appear * * * 3rd. If already appropriated to some public use that the use to which it is to be applied is a more necessary public use."

From these provisions it is clear that the use to which the defendant desired to subject the plaintiff's property in the current, conceding that he had any such property, was a more necessary use than that to which the plaintiff was applying the current at the time of the taking. It further appears that the use to which the defendant desired to place the waters of Snake River was necessary to the development of the natual resources of the State and the public good. And the Constitution and statutes establish a method by which the defendant could have subjected the plaintiff's property to its own uses. It seems that these provisions of the Constitution and statutes of Idaho were adopted and enacted with a view to just such a situation as has here arisen. Were the plaintiff seeking an injunction, the arguments and views of Judge Beatty would ap-

pear to us controlling, but in an action for damages, which might be termed in this case an inverted condemnation proceeding, we believe that they are not to be given the effect accorded to them.

In respect to the question suggested under this head as to whether the plaintiff's appropriation of the waters was reasonable, we think that no case prior to the one at bar has ever suggested that such use was not a reasonable one. In so far as this question is to be determined under the law of riparian rights, the argument that the use is unreasonable involves a peculiar inversion of ideas, because under that law, the reasonable use which is permitted is the antithesis of the excessive use which is prohibited. A use would be said to be reasonable in direct proportion to its conformity to natural conditions, and the unreasonable or excessive use is that which involves a wider departure from those conditions. One who merely uses the current to generate power as it flows past his land makes the most reasonable use possible of that current; whereas, one who dams the stream and destroys the current which had already been subjected to use by other riparian owners, makes an unreasonable use of the stream.

On the other hand, under the law of appropriation, the test of reasonableness is one of necessity. One is not permitted to take or use more water than he needs, to the detriment of others. In the same way, it might be said that one may not appropriate more of the current than he needs; but in the case at bar, the current was absolutely necessary to make the water appropriation available. If, then, necessity is the test, the use was reasonable. We think there is no question but what a thousand or more appropriators subsequent to the plaintiff could have erected just such appliances as did the plaintiff for the appropriation of the current without interfering with the plaintiff's appropriation. The current, while it was flowing, was susceptible of indefinte use. Now that it has been destroyed, it is susceptible to no use whatever. We submit that on the question of reasonableness the authorities are all in our favor.

*The Decision Sanctions the Taking of Private Property for Public Use Without Compensation and the Deprivation of Property Without Process of Law.*

We do not wish to be understood as intimating in this connection that there is a Federal constitutional question involved, such as to confer jurisdiction on this Court on that ground. We are aware that the limitation imposed by the 14th amendment to the Constitution of the United States acts on the legislatures of the States and not on the Federal courts, and we are willing to assume, at least, that the 5th amendment to the Federal Constitution is directed against the Congress rather than against the judiciary. Nor will we plead guilty to the *petitio principii* which would be involved in assuming that the plaintiff had a property right in the current of the stream, for that is the very question at issue. We wish in this connection merely to emphasize the allegation of the complaint, admitted for the purpose of the demurrer, to the effect that this means of appropriation and diversion adopted by the plaintiff, was the only one available to the irrigation of his lands, and that by the destruction thereof, the plaintiff has not been able since that time, and will not in the future be able to irrigate his lands or raise crops. (Printed record p. 3.) To deny, then, to the plaintiff, the right to the current of the stream, amounts to authorizing the total destruction of his lands so far as their value or utility is concerned. We submit that a conclusion of a court which works this result—one which neither the Congress nor a State legislature could accomplish by direct legislation without infringing the constitutional provision quoted—should be subjected to a careful scrutiny before it is finally affirmed.

The provisions of the Constitution and of the statutes of Idaho authorizing the condemnation of property have already been sufficiently examined.

On the whole case, therefore, we submit that the questions involved are of such importance, that there is such a conflict of decision thereon, and that there is such a prob-

ability of error, as would justify this Court in the interests of uniformity of decision and in the larger interests of a great portion of this nation, in bringing up this record for final review and determination, and that a writ of certiorari should be granted.

Respectfully submitted,

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*Of Counsel.*

# In the Supreme Court of the United States.

October Term, 1908.

HENRY SCHODDE,
Petitioner,

vs.

TWIN FALLS LAND & WATER COMPANY,
Respondent.

No. 583

## Brief of Respondent in Opposition to Petition for Writ of Certiorari.

This cause was before the Circuit Court for the District of Idaho upon a demurrer to the complaint of Petitioner, Henry Schodde, wherein damages to the amount of $56,550 were sought against the defendant, Twin Falls Land & Water Company, upon three similar causes of action. The demurrer was there sustained and the action dismissed. Upon writ of error the cause was again heard in the Circuit Court of Appeals for the Ninth Circuit, and the judgment affirmed. The petitioner now seeks a review in this court, upon the theory that the importance of the case demands such review, and that there

is a probability of error having been committed. Both these proposition are controverted by the respondent.

## FACTS INVOLVED.

The Snake River, one of the great streams of the continent, flows with its tributaries for a thousand miles through four States, and at American Falls, Twin Falls and Shoshone Falls, in the State of Idaho, there are cataracts of great scenic interest. Its course is in great part through the "Snake River plains," a region of lava formation (10 Universal Cyclopaedia 589), in the arid region of Idaho, and its volume is such as to suffice for the irrigation of millions of acres if entirely utilized. It has been accurately measured under the direction of the U. S. Geological Survey, at Montgomery's Ferry, in Idaho, a few miles distant from the lands involved in this controversy. At this point the river has a drainage area of 22,600 square miles, about one-half the area of the State of New York (Water Supply and Irrigation Papers, U. S. Geological Survey, No. 11, p. 99), and the measurements made between 1895 and 1901 show a minimum flow (August, 1901,) of 2115 cubic feet per second, and a maximum flow (June, 1896,) of 39,551 cubic feet per second. (Report State Engineer of Idaho, 1901-2, p. 68; U. S. Geological Survey Report, 1896-7, Part IV, p. 336.) The flow for this one month would cover the entire State of Rhode Island to a depth of three feet, and the total discharge of the river for ten months of the year 1896, as estimated by the Geological Survey, would flood the entire land surface of the State of Maryland to the depth of about one foot.

The importance of the river as a source of irrigation for the great tracts of fertile land through which it flows is further shown in the Report of the State Commissioner of Irrigation of Idaho, 1904, an extract from which is given in the supplement to this brief.

This suit is based, as we shall see, upon the claim of the petitioner that he had appropriated this vast stream to the irrigation of 422 acres of arid land, and that by such prior appropriation he had precluded its use by the respondent or by any other person, of the Snake River for the irrigation and reclamation of the vast regions lying along its banks, which are susceptible to irrigation only by the waters of this stream.

The size of the river, and the wide disparity existing between the flood or high water and the low water of each year, together with the character of bed in which it flows combine to render it extremely difficult, from American Falls down to its union with the Columbia, to divert its waters upon the soil. These lower reaches of the river, though traversing great plains of fertile soil, have remained for the most part until very recently unutilized because of the great expense necessary to curbing the flow and diverting the waters from the bed of the stream. Its banks are of lava or basalt, and only by engineering works constructed at great expense could the stream be raised to the level of the abutting lands.

It was upon this part of the river that the plaintiff established himself.

Like hundreds of other settlers engaged in agriculture, stock-raising or mining, he had not the means with

which to dam the river so as to bring its level to that of the surrounding lands. Its fall was too slight to permit of the taking out of water through a ditch starting at the grade of the river, as is commonly done upon the upper Snake, for the reason that any such channel must sooner or later run into a wall or layer of basalt, which it is impracticable to cut or tunnel through. Accordingly for decades the great river rolled on through the Snake River plains, leaving them as barren and dusty as though it did not exist, while all over the West, by individual and corporate enterprise, the streams and water courses were being diverted upon lands much less agriculturally valuable. It was apparent to everyone, the plaintiff included, that some day, but only through the agency of public or private capital, the river would be dammed and the public waters of the State flowing unused to the sea would be diverted to the use for which they were manifestly destined.

The petitioner, like hundreds of others along the Snake River, had recourse to a method of diversion of water which is simplicity itself, and which has been made use of in Africa and Asia since before civilization began —the current-wheel. Finding it impossible to dam the great stream so as to divert or even curb its flow, petitioner took advantage of the current of the river by erecting in or at the margin of the stream wheels which, being so placed as to utilize an infinitesimal portion of the flow to turn them, slowly and with more or less uncertainty brought to a higher level a still smaller quantity of the water of the river. The method is primitive, but

within certain narrow limits and at certain stages of the river was effectual. The U. S. Department of Agriculture has issued a bulletin (No. 146) upon current wheels, containing numerous descriptions and illustrations of typical wheels, from which we quote in the supplement to this brief.

Petitioner states in his complaint that at some considerable expense he and his predecessors constructed current wheels which, as we understand the complaint, were capable at a low stage of the river of raising to a sufficient height to be available water for the irrigation of his land. It is stated that the plaintiff and his predecessors built wing dams to divert the flow at low stages of the water to the wheels, bringing the level of water just above the wheels some three feet higher than it otherwise would have been. The same result would no doubt have been obtained by placing the wheels in the center of the current, or by digging a trench so as to divert the current at low water under the wheels. We see no advantage save only perhaps in the way of successful maintenance of one method of construction over another. The expense and labor is merely a part of that incident to the construction of the current wheels. It is not claimed that the "wing dams" so called diverted the water *from* the channel, but only *in* the channel of the river.

It must be borne in mind that these current wheels of necessity require that the river remain at a constant or nearly constant level for their successful operation. Of course, by building dykes to ward off an excess of

water, or by digging a trench or constructing a wing dam in the channel, a greater variation of flow could be utilized. But it is apparent that a level of the river caused through flood or otherwise which would bring the water up too near to the axle of the wheel, or a diminution of flow which would leave too little water to reach the wheel, or be insufficient to turn it, would equally destroy its efficiency. For the operation of the wheel, therefore, the owner must have the stream in its natural condition, or at least the stream must be permitted to flow uninterruptedly with approximately the current and volume which it had at the time the wheel was constructed.

The petitioner continued to use his wheels for the purpose for which they were constructed until the happening of the events mentioned in the complaint. There is below him and contiguous to Snake River an immense body of land capable of being watered from the Snake River by the construction of a dam forty feet high and a canal system in connection therewith at a cost of $1,500,000, which system when completed will bring under irrigation 300,000 acres of land. This tract will, with the towns certain to be built thereon, support a population of not less than 25,000. The allegation is explicit that 5000 people are now dependent upon the system for their water supply for all purposes. The dam made necessary by this enterprise, which has been completed, has backed up the waters of Snake River for a distance of some nine miles, to such an extent that at the point where the wheels of plaintiff are situated the current necessary for the operation of the wheels has been

stopped. It is apparent from the complaint that the result is one that could not be avoided in carrying out the work necessary to make the water available for irrigation, and no fault is found with the manner in which it has been done.

The statement is made that some assurance was given to the plaintiff during the progress of the work by officers or agents of defendant that the operation of the dam would have no effect upon the wheels or water supply of plaintiff, and that for this reason he made no effort to prevent the construction of the same. The purpose of this allegation is evidently to excuse delay on his part in seeking relief from the Court, and indicates the theory of plaintiff and his counsel that had he begun in time and upon the equity side of the Court, the construction of the improvement in question would have been enjoined as an interference with his rights in the river.

The complaint here made is not against the defendant for depriving the petitioner of the water appropriated and used by him upon his land. It is not denied that it still flows in the channel of the river, nor is there alleged any threat or design of the defendant to seek to prevent his taking it from the channel. In fact the charge is that there is more water in the river bed opposite his land than before. Complaint made is that by a disturbance of the natural order of things which prevailed when he made settlement along the banks of the river and constructed his wheels, it has been rendered more difficult for petitioner to divert from the bed of the stream the water to which he is entitled by appropriation, and, in fact,

that it has become impossible for him to divert it by means of the agencies which he has heretofore employed.

Put in another form: the complaint of petitioner is that by the installation of his current wheels in the stream he became vested with a right to have the stream remain at the same level and flow with the same current which it had when he began the diversion of the stream which he has used on his farm and mining claim.

As a corrollary therefrom it follows that he claims not only that the level of the river may not be raised so as to stop his wheels, but if, as the result of some compulsory process of this Court or through some convulsion of the earth, the present dam should be destroyed, it could not be rebuilt without his permission. It also follows that if the Twin Falls Dam should be destroyed, an injunction could be laid upon the Minidoka Dam, some twenty miles above, if it should appear (as it certainly would) that at certain seasons of the year the water diverted and used upon the Minidoka tract would so far reduce the volume of the river as to make it impossible to run the plaintiff's wheels, though the 1000 or 1200 inches of water were still flowing in the river for his use.

It also follows as a corrollary that owners of current wheels below the dam may, at any time, when the Twin Falls Land & Water Company is diverting water through its irrigation system, bring their actions of injunction to prevent such use of the water, not because there is not sufficient flowing in the river to supply all their prior appropriations of water, but because thereby the level of

the river has become so altered as to render useless the current wheels established in and along its channel.

Nor is this mere theory or idle speculation. We may mention one claim by way of illustration somewhat of the same nature which has already been made and which affords a pertinent practical illustration of the extent to which the demands of plaintiff may logically be carried. A farmer having a small farm below the dam of defendant has made written complaint to the defendant that whereas for years he has been accustomed to irrigate his fields which lie in the river bottom by means of ditches taken out from the river and supplied by wing dams, he now cannot do so for the reason that the diversion and use of the water by the defendant above him has so diminished the volume of water that his head-gates are left high and dry; that the nature of the banks is such that the ditches cannot be adjusted to the diminished flow, and that, therefore, the defendant has deprived him of his water right. There is no claim that the water is not in the river in sufficient quantity to supply his needs, but merely that it now flows at a lower level in the channel and where he cannot reach it through the agencies formerly used. The theory evidently is that the appropriation was of a quantity of water lying or flowing on top of a greater body of water, and that this water flowing underneath or in the bottom of the channel may not be withdrawn to his detriment, and that legal damage would ensue if the waters appropriated were deprived of their support and let down to the bottom of the channel. Since his complaint is the exact converse of that of petitioner,

resting, in final analysis, upon the same right or supposed right, it is difficult to see why his cause of action should not be equally meritorious.

In opposition to the petition for the writ, respondent contends:

*First.*—That the cause is not of the gravity or importance sufficient to warrant the extraordinary interposition by this Court.

*Second.*—That upon the merits the judgment of the Circuit Court of Appeals was obviously correct.

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## I.

*The cause has not the gravity or importance requisite to warrant a review by this Court.*

The rule by which this Court is governed in the granting of the writ is stated as follows:

> "(The granting of the writ is) a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."
>
> *American Construction Co. vs. Jacksonville etc. R. Co., 148 U. S. 382.*

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."
>
> *Forsyth vs. Hammond, 166 U. S. 514.*

Where an applicant for the writ had been sentenced to imprisonment in the penitentiary for a period of five years, and the judgment involved also the forfeiture to the United States of all right or claim to the commissions, amounting to more than $10,000, the writ was denied, the Court saying:

> "However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of State and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and, indeed, no matter of general interest to the public."

*Fields vs. United States, 205 U. S. 292.*

Petitioner's counsel insist (Brief p. 16) that the case is a novel one, and that no decisions in direct support of the position taken by the lower courts can be found. It follows that there is no conflict between the decisions of State or Federal courts which will warrant the issuance of the writ. Seemingly to obviate this objection counsel urge that in the statement of its reasons for the judgment rendered, the Circuit Court of Appeals has made such argumentative use of principles of law and decisions of other courts as raises a conflict of decision.

We submit that this is no proper test of the question to be solved. The process of reasoning by which the ultimate result is arrived at is, for the purposes of this inquiry, immaterial. Were it otherwise, it would be difficult to avoid the conclusion that practically all those cases in

which courts of Federal jurisdiction have differed in their holding upon question of commercial law, or where they have differed in the deductions to be drawn from adjudged cases, must be brought to this Court for review. Confessedly, the case of *Johnson vs. Johnson, 95 Pac. 499*, does not deal with the question of water rights or appropriations, and it is manifest that the mere fact that both cases deal with the rights of a riparian proprietor in no way argues that a conflict between the Supreme Court of Idaho and the Circuit Court of Appeals has arisen, much less that it ever will arise. It will be sufficient to deal with such a controversy when it does arise.

Many pages of the brief of petitioner's counsel is devoted to a supposed conflict between what are deemed to be the inevitable deductions to be drawn from the opinions in the case at bar and cases adjudged by the Supreme Court of Idaho. We do not deem it necessary to further answer this contention.

Nor can it be contended that the question as here presented is one of general interest to the public. As actually presented and determined, it was as to whether the petitioner was, on the facts stated, entitled to recover damages which, from his *ex parte* averment, were fixed at $56,000. It was adjudged that he had no right to recover. It was a matter entirely between himself and the defendant. Had the judgment been otherwise, it might well be argued that a question of very grave importance and of public interest was presented, for by such an adjudication not only the rights of the defendant in respect to the damages here recoverable would be involved, but

its investment of $1,500,000 would be imperilled and the interests of the 5000 or 25,000 inhabitants of the irrigated tract placed in jeopardy. Not only so, but as pointed out by Judge Beatty, in his opinion (Rec. p. 15), the U. S. Reclamation project at Minidoka and the interests of the settlers thereunder, would be jeopardized, probably destroyed. All this, however, is beside the question. So far as disclosed, the petitioner herein is the only person who deems his rights adversely affected by the judgment complained of. However important to him, it is of no consequence to the public, which is interested, if at all, in contending for the finality of the judgment rendered.

We conclude, therefore, that the case is not one of gravity or importance.

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## II.

*The case was rightly decided upon the merits.*

The bare statement of the case presented by the pleadings we submit repels the probability of error in the judgment.

The petitioner, as a fundamental proposition, claims the right to hold for his use in the irrigation of 420 acres a mighty river which is actually now employed in rendering habitable not less than 470 square miles of the most productive land in the West, and bases this right upon the fact that some twenty years ago he chose to raise the water from the stream to his land by means of current wheels instead of by windmill, steam engine or other power.

Passing to an examination of the specific claim of

petitioner as made in his complaint, we observe that whatever be his rights, they must be tested by the law of "Appropriation" recognized in the arid States as distinguished from the Common Law of Riparian Rights.

The doctrine of Appropriation as to rights in water for irrigation, mining and power purposes has been firmly established, both by legislation and judicial decision, as the only principle applicable to the arid and semi-arid States. This is recognized as being entirely inconsistent with the common law Riparian Rights, so that the question has passed beyond the domain of controversy in these States.

There are seven States and Territories in which the common law of Riparian Rights is rejected in toto. These are:

Colorado.—*Hammond vs. Rose*, 7 Am. St. Rep. 258.

Arizona.—*Austin vs. Chandler*, 42 Pac. 483.

Idaho.—*Drake vs. Earhart*, 2 Idaho 716.

New Mexico.—*Frambley vs. Luterman*, 27 Pac. 312; *Albuquerque, etc., Co. vs. Gutierrez*, 61 Pac. 357.

Nevada.—*Reno, etc., Co. vs. Stevenson*, 19 Am. St. Rep. 364, 4 L. R. A. 60.

*Walsh vs. Wallace*, 26 Nev., 299, 99 Am. St. Rep. 692.

Utah.—*Cole vs. Richards Irrig. Co.*, 27 Utah 205, 101 Am. St. 962.

*Morris vs. Bean*, 146 Fed. 431.

Wyoming.—*Willey vs. Decker*, 100 Am. St. Rep. 939.

The right of appropriation is also confirmed by the Constitution of Idaho, (Article XV, Sec. 3,) and by Statute, (Rev. Stats. Sec. 3155).

Petitioner's claim to the natural flow of the entire river, unaffected by the appropriations of others, is unfounded for the following reasons:

1.—The water was appropriated only for irrigation, and the limit of the appropriation is the amount necessary to irrigate the 420 acres.

2.—The claim of petitioner to a further appropriation of the volume and current of the river is fallacious:

(a) Because the current or velocity is a mere incident of the stream, not capable of separate appropriation for irrigation purposes

(b) These acts of plaintiff do not constitute a legal appropriation, for the reason that so far as they look to the operation of the wheels—that is to say, so far as relates to the water by which the wheels were turned, there was no diversion as required by law.

(c) As an attempted appropriation, the placing of the wheels and the claim of the entire current of the river for their operation was void as being unreasonable.

(d) The attempted appropriation was also void as being vague and indefinite and not susceptible of any accurate measurement or computation.

(e) The attempted appropriation was void as being for a purpose not in a legal sense beneficial.

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## ARGUMENT.

1.—*The water was appropriated only for irrigation purposes, and the extent of the appropriation is measured by the needs of the land irrigated.*

We do not in any manner dispute the validity of the petitioner's prior appropriation of the water actually

used by him upon the land described in the complaint. To that extent neither the respondent nor any one else, excepting the State, and then only upon just compensation, can deprive him of it. There is no hint in the complaint of any intention to appropriate for any power purposes, and the present claim is manifestly made by afterthought to bolster up the extravagant claims to the entire river.

2.—*The claim of petitioner to a further appropriation of the volume and current of the river is fallacious.*

(a) The current of the stream is a mere incident or passing phase of the water flowing in the bed of the stream.

Whatever may be said of an appropriation or location of power rights upon a stream (a beneficial use of which for these purposes is well recognized) in considering its appropriation for irrigation purposes, the law recognizes no proprietary right in its velocity. Considered as an irrigation stream, its purity is merely an unconsidered incident. Consequently, no amount of pollution by silt is regarded as an encroachment upon the rights of takers lower down the stream, so long as the current is not used as a vehicle upon which to convey soil and detritus.

*Kinney on Irrigation*, Sec. 250.

But the current, or rather the velocity-head of the stream, which is the factor effective in the propulsion of current wheels, (see U. S. Department of Agriculture Bulletin 146 in Supplement) is dependent upon the height through which the water is falling at the given

point, and this must depend upon the volume of water in the river.

This must depend in part upon the amount of water diverted by others, which right of diversion is secured by the Constitution of Idaho.

> "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."
>
> *Const. Idaho,* Art. XV., Sec. 3.

It is apparent that where waters have been diverted only for irrigation purposes, and there remains an unused flow of the stream, there must exist a constitutional right to appropriate and *divert* from the bed of the stream such unappropriated waters. But then a current without flowing water would be like a shadow without the substance to cast it. It follows, therefore, that the current is in respect to waters appropriated for irrigating purposes a mere incident to the water, and if the right exists to use the waters, the right to use or destroy the current goes with it.

So if the respondent had the right to use the unappropriated waters of Snake River, (which seems to be conceded by petitioner) it had the right to use or destroy if necessary such current or velocity as these waters might possess.

(b) The acts of plaintiff do not constitute a legal appropriation for the reason that so far as these acts look to the operation of the current wheels, and the use of the water for that purpose, there was no *diversion* as required by law.

The basis of the appropriation of water, the *sine qua non*, the fundamental prerequisite, is diversion. Without diversion of the water, a turning or curbing or other physical control of the waters of a stream, there can be no appropriation. By this we do not mean necessarily that the stream or any part of it must be taken laterally from its natural channel, for a dam for power purposes might be constructed whereby the flowing waters are lifted vertically and allowed to drop through a flume or penstock upon a wheel for the generation of power. But in some manner, by design, and against the operation of natural forces the stream, or some part of it, must be controlled and diverted from its natural course. This is implied in statutes and constitutional provisions referring to the act of appropriation.

> "The right to *divert* and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."
>
> *Const. Idaho*, Art. XV, Sec. 3.

Laws of Idaho, 1903, p. 223, are explicit on the subject and the diversion of the water as a part of the act of appropriation is constantly referred to.

> "Sec. 1. Before commencing the construction, enlargement or extension of change in the point of diversion, * * * such application must set forth * * * the amount of water to be *diverted* and used. * * * The application shall be accompanied by a plan and map in duplicate of the proposed works for the *diversion* and application of the water to a beneficial use, showing * * * all other works proposed to be used by them in the *diversion* of the water.

"No one shall be authorized to *divert* for irrigation purposes more than one cubic foot of water per second for each 50 acres."

"Sec. 2. * * * Any applicant * * * may appeal to the District Court of the county in which the point of *diversion* of the proposed appropriation shall be situated."

"Sec. 3. * * * Any person holding any permit for the *diversion* of waters from the same stream."

"Sec. 4. On or before the date set for the completion of works for the *diversion* and application of water. * * * In case of all canals or other works designed to *divert* and carry more than 50 cubic feet. * * * And in the case of works capable of *diverting* on the date set for such completion. * * *"

"Sec. 5. * * * Whether or not they conform to the terms of the application and permit and are capable of *diverting* the amount of water intended, and he shall ascertain how much water such works are capable of *diverting* and conducting. * * *"

"Certificate shall be set forth * * * (7) the quantity of water which can be *diverted* by the same and conducted to the place of intended use."

"Sec. 41. All rights to *divert* and use the waters of this State for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this act."

So also the laws of Idaho in force at the time these wheels were placed in the river carry out the same idea.

*Rev. Stats. Idaho*, Secs. 3155 *et seq.*

"3157. The person entitled to the use may change the place of *diversion* if others are not injured

and may extend the ditch, flume * * *by which the diversion* is made."

"3158. The waters appropriated may be turned into the channel of another stream * * and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished."

A moment's reflection will show the absurdity of a reference to the waters used in turning these wheels as being turned into another stream, or as being reclaimed therefrom. They were never so brought under control as that under any circumstances they could be even measured.

"3160. A person desiring to appropriate water must post a notice * * at the point of *diversion,* stating therein:

"1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure, and accurately describing the point of *diversion.*

"2. The purpose for which he claims it, and the place of intended use;

"3. The means by which he intends to *divert* it, and the size of the flume, ditch, pipe or aqueduct in which he intends to *divert* it; a copy of the notice must, within ten days after it is posted, be recorded in the office of the Recorder of the county in which it is posted."

"Sec. 3161. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to *divert* the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain."

"Sec. 3162. By 'completion' is meant conducting the waters to the place of intended use."

"Sec. 3165. All ditches, canals and other works heretofore made, constructed, or provided by means of which the waters of any stream have been *diverted* and applied to any beneficial use, must be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with, the requirements of this chapter."

"Sec. 3166. Persons who have heretofore claimed the right to water, and who have not constructed works in which to *divert* it and who have not *diverted* nor applied it to some useful purpose, must, after this Title takes effect, and within ninety days thereafter, proceed as in this Title provided, or their right ceases."

These statutes are merely declaratory of the general law upon the subject which has been enforced by the courts from early days.

The Constitution of Colorado also contains this provision, Article XVI, Sec. 6:

"The right to *divert* unappropriated waters from natural stream to beneficial uses shall never be denied."

The courts and text writers also insist that a diversion in some manner by reducing the waters to possession is an essential feature of an appropriation.

"Plaintiff in error forgets that it is just as necessary to the creation and preservation of a water right to provide means for the continual *diversion* of the water from the natural channel and for conducting it to the place where it is applied

to some beneficial purpose as it is to apply to the beneficial purpose."

*McPhail vs. Forrey,* (Wyo.), 35 Pac. 774.

"In addition to the filing of the notice and the intention to make the appropriation, there must be *actual diversion* of water from the stream."

3 *Farnham Waters,* Sec. 666.

"We observe first that to constitute a valid appropriation of water, there must be an *actual diversion* of the water from the natural stream or other source of supply, with the intent to apply it to some beneficial use, followed by an actual application of the water to the use designed, or to some other useful purpose, within a reasonable time."

*Long on Irrigation,* Sec. 36.

"To constitute a valid appropriation of water three elements must always exist: First, an intent to apply it to some beneficial use; second, *a diversion* from the natural channel by means of a ditch, canal or other structure; and third, an application of it within a reasonable time to some useful industry."

*Low vs. Rizor* (Oreg.), 37 Pac. 84, citing *Black Pom. Water Rights,* 48-51.

"The stream as yet flows in its natural course—a part of the realty. The appropriator certainly does not become the owner of the very body of the water until he has acquired control of it in conduits or reservoirs created by art, or applied to the purpose of leading or storing water by artificial means."

*Parks Canal & M. Co. vs. Hoyt,* 57 Cal. 46.

" 'Diversion' as applied to a water course means a turning aside or altering the natural course of the stream."

3 *Words and Phrases,* 2142.

So Mr. Kinney:

"No step which it is necessary to take to make the appropriation complete can be constructive. As the whole theory of appropriation for beneficial uses is based merely upon a prior possessory right entirely separate from the property in the land over which it runs, and no possession or exclusive property can be acquired while it is still flowing and remaining in its natural channel or stream, it follows, therefore, that in order to obtain possession of the water attempted to be appropriated, it is an indisputable requisite that there must be an *actual diversion* of the water from its natural channel into the appropriator's ditch, canal, reservoir or other structure. * * The law of the Pacific States makes it (actual diversion) an absolute necessity in order to acquire an exclusive property in the water."

*Kinney on Irrigation*, Secs. 162 and 159.

See also *Nevada Ditch Co. vs. Bennett*, (Oreg.), 60 Am. St. Rep. 777, to which there is appended a valuable monograph.

"Cutting wild grass produced by the overflow of the river, or as expressed by the witness, by the water of Reese River coming down and spreading over the land, was not an appropriation of that water within the meaning of that term."

*Walsh vs. Wallace* (Nev.), 99 Am. St. Rep. 700.

Our contention, therefore, is that there was no appropriation of the Snake River for the propulsion of petitioner's wheels for the reason that there was no diversion of the current *from* the channel. The slight diversion of a portion of the current from one part of the channel

to another for the purpose of deepening it at low water did not bring the river under subjection or control. It was in no sense a diversion. If he had placed the wheels over the middle thread of the current, or if he had dug a channel along close to the bank the result would have been obtained.

(c) The appropriation as claimed is void, because it is unreasonable.

Nothing is more firmly established than that all rights to waters, whether riparian or by appropriation, must be reasonable. If we could imagine an appropriation of the entire flow of the Snake River for the purpose of irrigating a 160-acre farm, the water being diverted from its channel into a porous, wasteful canal, which permitted only an infinitesimal amount of water to reach the irrigable lands, a court would have no hesitation in declaring the appropriation void because of the wasteful method of diversion and application. And this would unhesitatingly be done whatever the regularity of the proceedings taken or the undisputed priority of use.

In the case at bar an entire river is claimed as against the public represented by the defendant. Of the river flow some 1250 inches is used upon the lands, and the remainder, sufficient to irrigate and reclaim 300,000 acres, is not used except to raise the 1250 inches to the level of some 25 feet. The lower Court has rightfully said that this cannot be done. It is a waste which no one may make under the protection of law.

"Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cul-

tivation, as well as to enable miners to work their mining claims, and in all such cases the right of the first appropriation, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general conditions of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

*Basey vs. Gallagher*, 20 Wall. 670.

See also *Atchison vs. Peterson*, 20 Wall. 507.

"This right (to use of water) is not unrestricted, however. It must be exercised within reasonable limits. *Basey vs. Gallagher*, 20 Wall. 670. While no mention of dams or reservoirs is made in the law, we are of the opinion that, so far as they may be necessary to the reasonable appropriation of such waters, they may be constructed; but as to whether such dams may be raised to the height of 85, 60 or even a less number of feet, we do not deem it necessary in this case to express an opinion. Such dams and reservoirs must be kept within reasonable limits."

*Rio Grande W. R. Co. vs. Telluride P. & T. Co.*, 16 Utah 137.

"But whatever he may be irrigating, he is only entitled to the amount he needs, economically and reasonably used, and when he has that he cannot prevent others from using the surplus."

*Roeder vs. Stein* (Nev.), 42 Pac. 867.

"In a dry and arid country like Nevada, where the rains are insufficient to moisten the earth and irrigation becomes necessary for the successful raising of crops, the rights of prior appropriations

must be confined to a reasonable and necessary use. The agricultural resources of the State cannot be developed and our valley lands cannot be cultivated without the use of water from the streams to cause the earth to bring forth its precious fruits. No person can by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. The law, which recognizes the vested rights of prior appropriators, has always confined such rights within reasonable limits."

*Barnes vs. Sabron*, 10 Nevada 243.

"In *Simmons vs. Winter*, 21 Or. 35, Mr. Justice Lord says: 'The amount of water appropriated must be restricted to the quantity needed for the purpose.' The reason of the rule is, that by nature the water supply is limited in the arid regions, and habitation is dependent upon its use to make the earth yield up its precious metals and the soil to bring forth its fruits in season, hence the restriction of its use to quantities needed for beneficial purposes, as with such husbanding of the supply there is yet not sufficient to meet the increasing demands."

*Nevada Ditch Co. vs. Bennett* (Ore.), 60 Am. St. Rep. 787.

(d) The assumed appropriation for power purposes for the propulsion of the current wheels is void, because uncertain and indefinite.

In any case where an appropriation of water is claimed, it becomes above all things necessary that the

public in general, subsequent appropriators in particular, be notified in some clear and definite manner of the extent of the claims of such prior appropriator. It is essential that there be at least a reasonable amount of certainty. This may be arrived at by computations from the size of the ditch or other diverting works, or from the flume or penstock used in connection with a water wheel, or from a calculation of the height, volume and velocity of a stream necessary to produce a given horsepower.

In the case at bar we have absolutely no method of arriving at the amount of water claimed by the plaintiff as necessary for the uses to which he put the stream in driving the wheels. The only certainty is that he requires the stream to be left absolutely untouched, its natural level in the bed unchanged. The amount of water which he used is, according to his complaint, only a portion of the volume of the stream, and from the character of the wheels we know that it is only a small fraction of the water lying on the top of the current which was utilized in propelling, but this amount is entirely vague and uncertain. It might be only one thousandth, or only one hundred thousandth of the stream. Since he demands the entire flow of the stream at all times we do know from the Table of Flow, given in the measurements of the U. S. Geological Survey, that in some months more than fifteen times as much power is required than in others, and for the accomplishment of the same work.

(e) The assumed appropriation for power purposes is void, because not in a legal sense beneficial.

The courts and text writers seem to hold that any use

of the water for an unreasonable purpose or to an unreasonable extent is not a use for a beneficial purpose. It is difficult to distinguish in all cases, and yet there may be instances in which such a distinction may be drawn.

"An excessive diversion of water cannot be regarded as a diversion to beneficial use within the meaning of the constitution. Water in this country is too scarce and consequently too precious to admit of waste. The constitutional rule of distribution 'First come, first served,' does not imply that the prior appropriator may be extravagantly prodigal in dealing with this peculiar bounty of nature. We are aware that it may not be practicable to attain mathematical exactness in measuring the flow of water; but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply."

*Combs vs. Agricultural Ditch Co.* (Col.), 31 Am. St. Rep. 281.

"*Suppression of Wasting Waters.* There is no doubt as to the power of the legislatures of the States and Territories to enact laws, as many have done, for controlling and supervising the distribution of water from the streams running within their respective boundaries, and used for the purpose of irrigation, either by appropriators or those claiming the right to use the waters by virtue of being riparian owners, and thus preventing parties from causing wastage by diverting more than is actually needed for the purpose for which the appropriation was made. * * * In the early days a prior appropriation was esteemed to cover all water in sight, whether it was needed or not. But the principle of 'beneficial use' as the population increased soon put an end to that conception."

*Kinney on Irrigation*, Sec. 30.

Same. Sec. 166. "So the legislatures of many of the Pacific States and Territories, and the courts of all, soon put an end to these selfish and wasteful methods, and the principle of 'beneficial uses' was adopted. Water is too precious an article in the arid region to be permitted to run to waste, and the great weight of modern authorities hold that where a person has diverted a certain portion of the waters of a stream, and permits part of the water, so diverted, to run to waste, or fails to use a certain portion of the water for some beneficial use or purpose, he can only hold that part of the water diverted which has been actually applied to some beneficial use; and his priority only extends to the quantity so used. Also the authorities hold that there was no appropriation as to the water not used, and which ran to waste, but that the same might be subsequently appropriated and held by other parties, provided they took all the proper steps, and they themselves applied it to some beneficial use or purpose. The final test in all cases being whether *all* of the water diverted is actually applied to some useful or beneficial purpose."

Same. Sec. 167. "Upon this subject Chief Justice Hayt, of the Supreme Court of Colorado, in the opinion in the case of Fort Morgan Land Company vs. South Platte Ditch Company, says: 'The Court holds that they must not only take take water out of the stream, but must prove the regular use of it for irrigation. From the first this Court recognized and emphasized the idea that priority can only be legally acquired by the application of the water to some beneficial use. Hence there must not only be a diversion of the water from the natural stream, but the actual application of it to the soil to constitute a constitutional appropriation recognized for irrigation.' The above opinion shows the tendency of the courts in modern times not to allow any water to

> run to waste by means of pretended appropriations where the same are not completed and the water has not been actually used for some one of the beneficial purposes. And water rights attempted to be held in this manner without actual use are subject to appropriation by other parties on the ground that no appropriation has been made."

> "The rule against wastefulness is the chief limitation on the manner of use, as the water must be used for a beneficial purpose. Wastefulness is not countenanced."

*Wiel on Water Rights*, Sec. 127.

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## ARGUMENT OF PETITIONER.

Counsel for petitioner in the brief, p. 18, say:

> "The question is thus squarely presented, Does not a riparian owner, who has perfected a right to the use of water from a stream under the law of appropriation, acquire a right to the flow thereof under the common-law doctrine of riparian rights, when such use is necessary to make his appropriation available, as against a subsequent appropriator?"

The assumption that the petitioner has some right by virtue of his riparian ownership is shown by the statutes of Idaho, and the decision of its Supreme Court in *Drake vs. Earhart* to be unfounded. That the use of the whole stream may be necessary to make his appropriation of irrigation waters available is, we submit, unimportant, unless he has by some means known to the law appropriated or otherwise acquired the right to use the entire flow of the stream. A right held by another, or by the public, might be convenient or even necessary to petitioner to

the enjoyment of another right validly held. But the rights of another appropriator or of the public at large are not to be measured by petitioner's necessities.

The opinion of the trial Judge is quoted (p. 28) and the inference is drawn that the Court, in remarking upon the great possibilities of the Snake River, is arguing that the rights of petitioner must be subjected to the greater good of the State or the public at large as represented by respondent.

This is an unfair use of the opinion. It is apparent that the language was used by the learned Judge to illustrate and emphasize the argement urged upon and adopted by him that the appropriation attempted was utterly void because unreasonable, wasteful and not legally beneficial.

That portion of the opinion of the lower Court which is criticised in the brief of the plaintiff is, we submit, apt and pertinent to the case presented. When petitioner placed his wheels in the river and invoked the doctrine of appropriation for the purpose of acquiring a right to divert from the river water sufficient to irrigate his lands, he did so with the full knowledge that this same stream might in any reasonable manner be devoted to the irrigation of thousands of acres lying below him. He must have known—at least he is charged with notice of the fact—that the government and the state might in the future co-operate to confer upon this defendant and those who claim under it the right to divert the waters of the river to irrigate these lands, and that it would be a monstrous thing for him, in order to utilize his trifling appropriation,

to render forever useless the bounteous supply of water and to cause it to flow unused to the sea.

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## CONCLUSION.

The true question, we beg to suggest, is as to whether the change of the river from a natural to an artificial condition is or is not an injury to petitioner. That it may damage him we concede. The question is not whether vested rights may or may not be interfered with, but whether such privileges as petitioner enjoyed in operating his wheels in Snake River prior to the completion of the dam ever could become vested rights.

The absolute incompatibility of the claims of petitioner with the maintenance of the doctrine of appropriation is too obvious to need comment. Let us suppose that the Twin Falls project had never been undertaken; the government project known as the Minidoka project, some twenty miles above petitioner's wheels, was begun in 1904. Let us suppose that the government had appropriated and diverted from the Snake River all the water in the irrigation season, excepting the twelve hundred inches used by petitioner upon his farm. Obviously the wheels could not run with the same water which was to be taken out of the channel. Could he have restrained the enterprise or have collected damages? If so, what becomes of the right of appropriation?

Suppose again that instead of taking from the river all the water save 1200 inches they had allowed more to run, but nevertheless had so diminished the flow as to render his wheels useless because the level of the river

was lowered. What would then have been his remedy, if any? And if he had no remedy under such a condition, why should he have one if, under the same doctrine of appropriation, the respondent has produced what counsel calls an unnatural condition by raising instead of lowering the level of the stream? If it be answered that the petitioner, under the assumed circumstances, would have had a remedy, then it must follow that every irrigator down the Snake River from the Twin Falls dam to the mouth of the river, who has been using a current wheel, and every irrigator who has diverted water by means of a wing dam thrown out into the bed of the stream, will have his right of action for damages against this respondent or against the United States whenever either shall substantially diminish the stream by using it for irrigation. This consideration may not be an argument against the rights of petitioner, if he have any, but it shows the far-reaching effects of the contention made by counsel.

Counsel, in the Circuit Court of Appeals, made use of the following language in their brief:

> "Suppose for the sake of the argument this was a wheel in the stream established for furnishing motive power for a mill; could there be any question but what the party owning the mill would be entitled to damages in case a party locating a dam backed up the water so the wheels would not turn? Now in the case at bar, instead of using a wheel to furnish motive power for a mill, they use the wheel to carry the water a sufficient height to get it upon plaintiff's land."

The noticeable thing about this theory and the statement of fact in the last sentence is the confession that the

operation of the wheels to elevate water is entirely severable from the water right for irrigation. It is a distinct admission that so far as the water right for irrigation is concerned—in other words, the right to the beneficial use of some 1200 inches of water, it is not impaired by any act of the respondent, but that the loss suffered is to the supposed right to use water for power purposes through current wheels.

But technically speaking, the petitioner does not charge an invasion of any such right. We are charged with interfering with no appropriation for power purposes, but with an appropriation of some 1200 inches of water for irrigation. We are not informed as to when this power appropriation was made or the number of inches of water claimed therefor. There has been, according to petitioner, no step taken which indicates anything more than a mere intent to pump or lift water by these wheels so long as convenient and so long as the state of the river made it possible so to do, and then to abandon the same.

Waiving this technicality, if such it may be called, our answer is that the law will not permit the appropriation (in its nature exclusive) of such a river as the Snake to generate power for the doing of work that is nearer the capacity of a dog and tread mill. Such use is unreasonable, and as we have demonstrated, the law will not recognize a right growing out of such unreasonable use. And further, no such right was thereby acquired, because, as we have shown, there was no diversion of the stream.

We submit, therefore, that under any possible view, the judgment of the Circuit Court of Appeals was correct.

Respectfully submitted,

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Of Counsel.

# SUPPLEMENT.

**From the Report of the Commissioner of Immigration, Idaho, 1904.**

The southern district depends chiefly upon its water supply for irrigation and power for the development of its resources. The Snake River is the main artery of this great section of country, which is 250 miles long and 100 miles wide. The North Fork of this river rises in Henry Lake, which is located near the state line between Idaho and Montana, near the northeast corner of Fremont County, and also in Great Springs, located about fifteen miles southeast of Henry's Lake and from which flows a great river of pure, cold mountain water. The South Fork rises in Jackson's Lake, in Wyoming, just south of the Yellowstone National Park. These two streams receive the water from numerous tributaries and unite in the southern part of Fremont County, forming the Snake River proper, the largest river in Idaho. The general course of the stream from this point of confluence is southwesterly for a distance of 150 miles, crossing Bingham County into Oneida County to a short distance below the American Falls, where the direction turns nearly west. From its source to the American Falls, the banks of the river are generally low and the fall is rapid, permitting of easy construction of irrigation canals to cover the great benches of fertile lands that border the stream through this section. At American Falls the banks become higher, more abrupt and rocky, the formation being principally basaltic, and in many places the river seems

to cut its way through walls of solid rock. This condition obtains for about 100 miles below American Falls to a point near Milner, in Cassia County, where the river, with a great rush and flurry, enters a veritable canyon with precipitous walls of basaltic rock on either side. Some thirty miles below Milner the river makes a drop of 134 feet at what is known as Twin Falls. At this point an island has been formed on the very brink of the precipice, which divides the channel of the river into two parts, forming two nearly equal falls, from which it derives its name.

Four and one-half miles further down is the famous Shoshone Falls, with a drop of 210 feet. Eleven miles more and another drop of 139 feet is known as the Augur Falls. Within a distance of fifteen miles this great river makes a straight drop of 583 feet, creating the greatest natural water power in the United States. . . . .

The principal tributaries that flow from the north into the Snake River are the Wood, Boise, Payette and Weiser Rivers. The Port Neuf, Raft, Salmon Falls, Bruneau and Owyhee Rivers are tributaries from the south. In Fremont and Bingham Counties, along the headwaters of this river and along its tributaries in other parts of this district, are found great tracts of fertile valley lands that have been largely covered by irrigation canals, and the lands are generally settled and a large portion are in a high state of cultivation. In the interior of this great valley, located between the tributaries, both on the north and the south sides of the river, are found large tracts of high bench lands that are proving to be exceedingly fer-

tile and productive. To the naturally rich mountain soil that is found in all this region has been added a liberal deposit of volcanic ash and decomposed basaltic formation, which was deposited to a greater or less depth in all parts of this great valley during the volcanic disturbance that has visited this region. Scientific agriculturists assert that soils formed by a combination of volcanic ash and natural earth deposits contain the greatest amount of plant food, and will produce a great quantity of vegetable growth without refertilizing. The Island of Java is said by expert agriculturists to be the richest and most productive body of land in the world. This island, which has eleven active volcanoes, supports a population of 26,000,000 people, though its area is not so great as the State of Idaho and its area of cultivated lands is no greater than the area of lands subject to irrigation in the Snake River Valley of Southern Idaho. It is these tracts of fertile lands located in this section of the State that have attracted the attention of the reclamation service of the United States, and when the lands now withdrawn from the entry by the government have been supplied with water for irrigation, together with the 2,108,000 acres that are already covered by the canals of Southern Idaho, no State in the Union will contain so large an area of irrigated land, and the products of Idaho soil will contribute largely to the support of the Nation.

U. S. Department of Agriculture.
Office of Experiment Stations, Bulletin No. 146.
Current Wheels.

Washington, D. C., May 10, 1904.

Sir:—I have the honor to submit herewith a report describing a large number of current wheels in use in the arid West and in Italy.

Current wheels are often the cheapest means of raising small volumes of water short distances where much larger volumes are flowing by. A wheel can lift only a small percentage of the water passing it, and the cost of construction increases so rapidly with increased size that the large wheels necessary for high lifts can not be profitably built. But there are many places along streams and the upper section of canals where enough water for a few acres can be lifted a few feet with almost no cash outlay and without injury to the lower users, except for the small quantity of water taken.

The great advantage of current wheels is their extreme cheapness of construction and operation where conditions are favorable. A farmer of ordinary ingenuity, having a few tools, can usually build a wheel, principally from materials which are lying around his buildings, with little or no cash outlay. If the wheel is well built, the cost of operation will be limited to the purchase of oil and the making of repairs. However, the obtaining of the best results depends upon the observance of correct principles in the construction of the wheels, but the following of these principles involves no increased expense. The report herewith submitted contains a discussion of the theory of

current wheels and descriptions, photographs, and drawings of a large number of wheels now in use, with discussions which bring out their good and bad features. . .

Respectfully submitted,

ELWOOD MEAD,
Chief of Irrigation Investigations.

A. C. TRUE, Director.

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## CONSTRUCTION OF CURRENT WHEELS.

The practical experience of many irrigators in the construction and use of current wheels has been collected and is here presented as an answer to inquiries regarding their cost and efficiency.

In its simplest form a current wheel consists of a large skeleton roller made of wood, with paddles projecting beyond its rim. It is hung on a shaft and supported at both ends by piers or posts, so as to allow the wheel to dip into the water to the width of the paddles. The simplest device for raising water with such a wheel is a row of buckets placed on the rim so as to fill at the bottom of the wheel and empty into a trough near the top. . . . .

## THEORY OF POWER IN CURRENT WHEELS.

While a home-made undershot water wheel develops but little of the power in a running stream, still the action of the crudest wheel is governed by certain principles, an understanding of which will aid the builder in improving the design of his wheel, thereby increasing its efficiency.

Current wheels, unlike overshot wheels, do not act by

the weight of the water, but by the impulse of dynamic pressure of moving water. The power contained in running water is expressed in terms of the distance through which the water would have to fall in order to obtain the velocity observed. This distance is called the velocity head. A body falling freely four feet attains a velocity of sixteen feet per second. Hence water flowing sixteen feet per second has a velocity head of four feet; in other words, if an inclined plane were placed in such a stream, the water would run up it to the height of four feet before coming to rest. Thus the power contained in 1000 pounds of water running sixteen feet per second is exactly sufficient to raise a weight of 1000 pounds four feet. This weight in streams is from one to four feet per second, representing velocity heads of from one-fourth inch to three inches, so that some means other than an inclined plane must be used to raise water to a serviceable level. In any case work is performed only when the motion of the water is checked. The current wheel, by checking the motion of a large quantity of water to some degree, raises a very small quantity of water to a height of ten or a hundred times as great as the velocity head in the stream.

Since the printing of this brief, plaintiff in error, Henry Schodde, has died, and his executrix, Minnie Schodde, has been substituted as plaintiff in error in his place. References herein to "plaintiff" or "plaintiff in error," should therefore be read as referring to Henry Schodde, the plaintiff below, and not to his executrix, the now plaintiff.

# Supreme Court of the United States

OCTOBER TERM, 1910

NO.....

HENRY SCHODDE,
*Plaintiff in Error,*
vs.
TWIN FALLS LAND AND WATER COMPANY,
*Defendant in Error.*

*On Certiorari to the Circuit Court of Appeals for the Ninth Circuit.*

## Brief on Behalf of Plaintiff in Error

### STATEMENT OF THE CASE.

This action was brought by the Plaintiff in Error against the Defendant in Error in the District Court of Lincoln County, Idaho, on the 24th day of July, 1905. (Transcript p. 8.) The defendant procured the removal of the cause to the United States Circuit Court for the District of Idaho, on the ground of diverse citizenship, the plaintiff being a resident of Idaho, and the defendant a Utah corporation. (Transcript p. 11.) Upon appearing in the Circuit Court, the defendant filed a demurrer to the complaint, principally based upon the ground that it failed to state a cause of action (Tr. p. 12); this demurrer was sustained, and the plaintiff declining to plead further, judgment of dismissal was entered. (Tr. p. 13).

Plaintiff thereupon sued out a writ of error to the Circuit Court of Appeals for the Ninth Circuit (Tr. pp. 22-24); the cause was there heard and determined, and the judgment of the Circuit Court affirmed. (Tr. pp. 25-31). The plaintiff then, on October 24th, 1908, filed in this Court a petition for a writ of certiorari, which was granted on January 11, 1909, and the cause now stands for hearing on that writ.

The facts as shown by the complaint, which sets forth three causes of action all substantially the same except that they apply to different tracts of land, are that the plaintiff and his predecessors in interest, in two cases in 1889, and in the third case in 1895, made an appropriation of certain of the waters of Snake river for mining and agricultural purposes, and in order to apply the water thus appropriated to the lands which are riparian in character and abut upon the Snake river constructed wing dams and water wheels, in and over the bed of the river, in such a manner that the dams deflected the current to the wheels, which were thereby caused to revolve, catching up the water by means of buckets, and carrying it to flumes through which it was distributed upon the plaintiff's land. (Transcript p. 2). The current of the river at the place where the wheels are thus placed was naturally rapid, and of such velocity as to be available for power purposes. (Transcript ib.) The plaintiff and his predecessors in interest continued to use the water of the river, and to apply it by means of the power thus afforded to their lands, until 1905, in which year the defendant constructed a dam across Snake river, below the lands of the plaintiff, and, closing down the dam, impounded the water causing it to rise and flow back, and ultimately to become stationary, so that the current was destroyed, and its availability for power purposes ceased. (Transcript p. 3). The complaint further alleged that

there are no other means by which the plaintiff can avail himself of his appropriation of water; that his land has ceased to become profitable, and no crops can be raised thereon. (Transcript p. 3). These facts are confessed by the demurrer of the defendant. (Transcript p. 12).

The Circuit Court held that while the plaintiff was entitled to the water which he had appropriated for use upon his land, he was not protected in the establishment and use of his water wheels, for the diversion of the water to the land; that there was no appropriation of the water needed to operate the wheels. (Transcript pp. 15-16.) The Circuit Court of Appeals, in arriving at the same conclusion, said, (1) that the right to the current of the river was not appurtenant to the water location; (2) that there was no appropriation of the current; because, (a) no notice of intention to appropriate the current was posted, (b) there was no diversion of the water of the current, and, (c) the plaintiff did not apply the current to the soil as required where the appropriation is for irrigation; (3) that the means of utilizing the current was not attached as an appurtenance to the appropriation; and (4) that the right of appropriation must be exercised with some regard to the rights of the public, which was not done by the plaintiff. (Transcript pp. 28-31.)

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## ASSIGNMENT OF ERRORS.

The office of the writ of certiorari being simply to remove the record from the Circuit Court of Appeals to this Court, and the cause being here as if on writ of error to the Circuit Court for examination and determination, we repeat the assignment of errors as made in the Circuit Court of Appeals;

1. The Circuit Court erred in sustaining the demurrer of the defendant to the plaintiff's complaint.

2. The Circuit Court erred as to the plaintiff in ordering the demurrer to be sustained and judgment to be entered dismissing the action, and for costs against the plaintiff.

3. The Circuit Court erred as to this plaintiff in entering judgment in favor of defendant and against the plaintiff.

4. The Circuit Court erred as to this plaintiff in holding that the complaint herein did not state a cause of action against the defendant.

5. The Circuit Court erred as to this plaintiff in holding that the defendant was not liable for damages for the destruction of the water wheels, and the depriving of plaintiff of water of said wheels and the use of water for his said land.

And, with respect to the action of the Circuit Court of Appeals:

6. That the Circuit Court of appeals erred in affirming the judgment of the Circuit Court.

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## BRIEF OF ARGUMENT.

### Points.

In support of the foregoing assignment of errors, and in answer to the positions taken respectively by the Circuit Court and Court of Appeals as above outlined, we make the following points upon which we shall base our argument. These points, if sustained, also answer the argument advanced by the defendant both in the Circuit Court of Appeals, and in opposition to the issuance of the writ of certiorari by this court:

1. The complaint shows, whereas the decisions of both the Circuit Court and Court of Appeals ignore, that the plaintiff is a riparian proprietor. As such he would be entitled at common law to a continuance of the flow of the current of the steam. This common law right is not abrogated by the doctrine of appropriation as applied in Idaho, but is merely modified or supplemented as to the mode of its acquisition and the conditions of its enjoyment. The

plaintiff has complied with the requirements of the law of appropriation and has thus fixed his riparian right to the current, so as to vest the same in him as against subsequent appropriators.

2. Without regard to the doctrine of riparian rights, and simply under the law of appropriation, the plaintiff made a valid current appropriation, because he actually used and applied the current to a beneficial use. In answer to the opposite conclusion of the Circut Court of Appeals under this head, it should be noticed:

(a.) That no notice of intention to appropriate the current was necessary;

(b). That the diversion of the current within the channel, by means of wing dams, to the plaintiff's wheels, was a sufficient diversion, if any is required, to satisfy the law of appropriation; and,

(c). That the current appropriation being for power purposes, it was only necessary to beneficially apply the current to the generation of power, and it was not necessary to apply the current itself to the land irrigated by the water raised from the river.

3. Conceding *arguendo* that there was no valid current appropriation, the means of utilizing the current, by the wheels, was a part of, or appurtenant to, the appropriation of the water for irrigation. Both the means of diversion, and the point of diversion, are a part of the appropriation; the right to the means here employed was expressly conferred by statute, and the appropriation could not be made effectual in any other way.

4. The defendant as an individual—a private corporation—has no greater or different rights than the plaintiff, merely because it has appropriated a larger quantity of water, and distributes it among a larger number of users. If, on the other hand, its rights are of such a nature as to constitute it the representative of the public interest, it has the right of eminent domain, which is ample to protect both the public interest, and the private interest of the plaintiff.

## Argument.

### *1. The plaintiff's riparian rights.*

In the petition for certiorari we stated, after quoting the maxim, "*Aqua currit et debet currere ut currere solebat,*"

as epitomizing the doctrine of riparian rights, "It is probable that the Circuit Court of Appeals assumed that the doctrine of riparian rights has no place at all in the jurisprudence of Idaho, and that therefore the cases based on that doctrine are without application to the case at bar. But we think that this assumption is gratuitous and unfounded. We are thus brought to consider the important question whether the doctrine of riparian rights is of any validity in those states which have adopted the law of appropriation." We now propose to develop our argument upon this point as presented in our first thesis. For convenience in reference we will divide the point into subheads.

*(a.) Summary of the common law doctrine.*

As a point of departure, let us summarize the common law doctrine of riparian rights. For this purpose we shall use the work of Chancellor Kent, both because it is the most succinct statement of that doctrine which we have been able to find in any standard treatise or authority, and because this very language has been quoted approvingly by this Court as a statement of the common law rules.

> "Every proprietor of lands upon the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*, is the language of the law. Though he may use the water as it runs over the land as an incident to the land, he must not unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining

proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years which is evidence of it. This is the clear and settled general doctrine upon the subject, and all the difficulty lies in its application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him. * * * * There will, no doubt, inevitably be, in the exercise of a perfect right to the use of water, some evaporation and decrease of it, and some variations in the weight and velocity of the current, but *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury and the manner of using the water. All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors above or below on the stream."

*3 Kent Commentaries, pp. 439-441; cited U. S. v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, loc. cit. 702.*

From this summary of the law, four leading principles may be deduced and given expression, for purposes of comparison with the law of appropriation, as follows:

i. The right to the use of water flows from riparian ownership of land; it belongs to the land, and, except as an incident to the ownership of riparian land, can be acquired only by grant from a riparian owner, or by prescription presupposing such a grant.

ii. The water must be permitted to run in its accustomed channel, without material alteration of the channel, or acceleration or diminution of the flow.

iii. The rights of the various riparian proprietors are equal regardless of any priority in such use; each must be careful not to injure any other.

iv. Each proprietor may make a reasonable use of the water as it passes along, even though there is some slight decrease in quantity, or variation in weight and velocity, of the current.

*(b) Origin and development of doctrine of appropriation.*

The doctrine of appropriation, which is claimed to have overthrown the common law doctrine in many of the western States, Idaho among the number, had its historical origin in the customs of the California miners, and its legal justification in necessity. It was first authoritatively recognized by the Supreme Court of California in the case of *Irwin v. Phillips, 5 Cal. 140*, decided in 1855, where it was held, no private riparian rights being involved, that a miner who had made a prior location of the waters of a stream and had diverted them for mining purposes, had a right superior to that of a subsequent locator upon the banks of the stream below the point of diversion.

The next important case upon the subject is *Conger v. Weaver, 6 Cal. 548*, where the right of appropriation is based upon a presumed grant or license from the state, though in a later case Chief Justice Murray says that the right might have been based upon appropriation by a riparian proprietor, following older English authorities. This later case seems to have established beyond question the right of the first appropriator as against a subsequent locator upon the same stream.

*Hill v. King, 8 Cal. 336.*

Concurrently with the decision in Hill v. King, an interesting opinion discussing the basis and nature of the right of appropriation, and its distinction from the common law doctrine was delivered. There, after discussing the difficulties which confronted the court under the conditions which surrounded it, and the impossibility of always arriving at just conclusions upon the novel questions presented, it is said:

> "The use of water for domestic purpose, and for the watering of stock, are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases, the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases, the element is also entirely consumed. * * * Entire absorption is the contemplated result of irrigation. When properly used as a motive power for propelling machinery, the element is not injured because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Any number of riparian proprietors can use the water as a motive power in succession, without substantial injury to any other, for the element is just as good for the purposes of the last, as for those of the first proprietor. * * * In countries governed by the common law it is not so difficult to understand the principles that regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary. * * * No one was entitled to deterioriate the quality of the water. And for the purposes of a motive power there was no use which could impair its quality. But in our mineral region we have a novel use of water, that cannot be classed with the preferred uses; but still a use which deterioriates the quality of the element itself, when wanted a second time for the same purpose." It was held that a miner could not complain of a de-

terioration of quality of water by a subsequent appropriator.

*Bear River Co. v. New York Min. Co., 8 Cal. 327.*

This case is mentioned merely because of its light upon the considerations which controlled courts in establishing the doctrine of appropriation. It should be noticed that in these cases there is no denial of riparian rights if any should have accrued, and about the same time as these decisions, there is a distinct recognition of riparian rights in a riparian proprietor as against all but precedent appropriators. *Crandall v. Woods, 8 Cal. 136.* But in *Hill v. King, supra,* appropriation is established as a distinct doctrine, not based upon the common law, but derived from the customs of miners, and until the decision in *Lux v. Haggin (1886), 69 Cal. 225,* the California court is devoted to the development of the doctrine of appropriation.

While the doctrine of appropriation is thus established as independent of that of riparian rights, its principles come to be assimilated to the latter doctrine. A case decided in 1863 is quite in point. There the plaintiffs appropriated water for mining purposes, and the defendants subsequently erected a saw mill further up the stream, building a dam, the effect of which was to cause the water to flow irregularly, sometimes failing to supply the plaintiff's ditch, and other times letting the water down in greatly increased volume. The decision was for the plaintiff, and was based, not on riparian ownership, but upon prior appropriation. The court, however, used language which might have been, and in fact evidently was, taken from a text book on the common law of riparian rights. (Angell on Waters.) They say:

"First, then, as to the injury caused by the irregularity of the flow of water. The importance of a regular flow of water to mining ditches is apparent. The

profits of the business of mining depend, to a very great extent, upon a steady, constant, supply of water, flowing with regularity to the reservoirs conducted to receive and hold it, and regularly distributed to the miners who depend upon it for their supply. The rule of law is well established that the owner of hydraulic works on the stream above, has no right to detain the water unreasonably. He must so construct his mill, or other works, and so use the water, that all persons below him, who have a prior or equal right to the use of the water, may participate in its use and enjoyment without interruption. * * * It is said that the proprietors above have a right to the reasonable use of the water, but the true test of this is, whether such use causes any sensible injury to the proprietor or prior appropriator below, by diminishing the value of the right."

*Phoenix Water Co. v. Fletcher, 23 Cal. 481.*

In another case of about the same time, speaking of a "notion" that the rules of the common law touching water rights had been materially modified in California, Chief Justice Sanderson says:

"This notion is without any substantial foundation. The reasons which constitute the ground work of the common law upon this subject remain unchanged. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim *sic utere tuo ut alienum non laedas*, upon which they are grounded, has lost none of its governing force; on the contrary it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of the stream flow in its natural channel—*ut currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to the land and because water in its pure state is indispensable for domestic uses. But this rule is not

applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose. * * * Yet the maxim above mentioned upon which the rule is founded is equally as applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights of a like use by the other. * * So that in all controversies like the present the question to be determined after all is the same as that presented by a like controversy between riparian proprietors, to-wit: Has the plaintiff's use and enjoyment of the water for the purposes for which he claims its use been impaired by the acts of the defendant."

*Hill v. Smith, 27 Cal. 476.*

(c.) *Conflict between appropriation and riparian rights.*

We cannot go at any length into the conflict between the doctrines of appropriation and riparian rights. The decision in *Hill v. Smith*, was rendered in 1865, and from that time on until 1886, there seems to have been practically no express recognition of riparian rights as such until 1886, when the famous case of *Lux v. Haggin, supra*, settled the question for California, deciding that the doctrines of riparian rights and of appropriation were independent, but not destructive of each other; that prior to vesting of title to riparian lands, the water is subject to appropriation, but after title to the land has vested, no hostile appropriation of the water can be made.

Prior to the decision in *Lux v. Haggin*, there had been two cases decided in Colorado, though neither of them really involved the point, in which the doctrine of riparian rights was rejected in so far as rights claimed solely as a riparian proprietor conflict with rights claimed as an appropriator; that no rights can be acquired except by appropriation.

*Yunker v. Nichols, 1 Colo. 551.*

*Coffin v. Left Hand Ditch Co., 6 Colo. 443.*

It is the latter of these cases that is usually cited as the original precedent for the "Colorado doctrine," which is supposed to have abrogated the doctrine of riparian rights in the states where it has been adopted.

*See Long, Irrigation, Sec. 6.*

The defendant, in its brief in opposition to the writ of certiorari, cites the decisions of seven states and territories, following the Colorado doctrine, and rejecting *in toto* the doctrine of riparian rights. (See Brief, p. 14). Idaho is included among these. As it is Idaho in which we are interested, we shall discuss it at length, and pass over the others for the present, at least.

Before taking up the Idaho decisions, we would remark that the decisions of this Court seem to regard the question as one of the local law, and to follow the rule laid down by the state courts having jurisdiction to declare the law in the particular case.

*United States v. Rio Grande, etc., Co., 174 U. S. 690.*
*Gutierres v. Albuquerque Co., 188 U. S. 545.*
*Clark v. Nash, 198 U. S. 361.*
*Kansas v. Colorado, 206 U. S. 46.*

*(d.) Riparian rights in Idaho.*

Water law in Idaho begins with an act approved February 10th, 1881, entitled "An Act to Regulate the Right to the Use of Water for Mining, Agricultural, Manufacturing, and other Purposes." *See Laws 1881, 267.* We have been unable to ascertain with precision the immediate source of this act, but it is without question based, at least remotely, upon the California act of 1872, as contained in the Codes of that year. The first ten sections, which are all which relate to appropriation, with the exception of the tenth, seem to be framed with a studious desire to express

the sense and arrangement of the California statute, while avoiding its verbiage. *See California Civil Code, 1872, Secs. 1410-1422.* But in 1887, dissatisfied with this bastard progeny of dubious paternity, the legislature frankly confessed its alliance, and adopted the California sections above cited *verbatim. See Revised Statutes, 1887, Secs. 3155-3167.* The tenth section of the original act was preserved in Section 3180 of the Revised Statutes, and is still law in Idaho, being contained in Section 3299 of the Revised Codes of 1909. We quote it in full:

> "All persons, companies, and corporations, owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."

It was in this state of the statute law that the Supreme Court of Idaho was called upon to pass upon the relative rights of an appropriator and a riparian proprietor. Certain parties, one Drake and others, had settled upon unsurveyed land, and had appropriated the waters of "Quigley gulch" for its irrigation. Subsequently Earhart and others became possessed of riparian lands farther up the gulch, and commenced the use of the water. Drake and his associates brought suit for injunction to restrain such use. According to the report of the case, the plaintiff in his brief advanced the following proposition: "The right of a prior appropriator to water appropriated for a beneficial use is superior to that of a riparian owner of land, who became the owner after the appropriation." In support of this proposition are cited several California cases, among them *Lux v. Haggin,* Oregon and Washington cases (both of which states accept the California doctrine of riparian rights), and a couple of Nevada and Arizona cases. It will thus be observed that all that was necessary to a decision, and all that was contended for

by counsel, was the adoption of the modified doctrine of riparian rights, which subjects them to rights of appropriation previously acquired. It has been assumed that the court went beyond this question and swept away the whole doctrine of riparian rights. Such is the language of the defendant's brief, previously referred to and on file with this Court, where he says "The common law of riparian rights is rejected *in toto*." *(Respondent's brief on Certiorari, p. 14.)* But we think a moderately careful reading of the opinion will show that the court merely decided the question before it, viz: that riparian rights are subordinate to appropriations made prior to their accrual. Aside from the fact that that was the only question presented and the only question urged, we see from the quotation which follows that the court limited its language to that question. The italics, introduced for emphasis of this point, are our own.

> "The important question for the settlement of which this appeal was chiefly brought, is what, if any, rights the appellant has to any of the water, as a riparian proprietor. His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows by its natural channel through his land; hence, that he is entitled to the use thereof allowed by the common law. This doctrine of riparian proprietorship in water *as against prior appropriation*, has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky mountains, as well as by the Supreme Court of the United States. * * * While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, *based upon facts like those in this case*, has been so often decided adversely to this claim *and in favor of*

*the prior appropriation*, that the maxim, 'First in time, first in right,' should be considered the settled law here."

The court then gives the history of the rule and cites the early California cases, and the then ruling decisions of this court, including *Basey v. Gallagher, 20 Wall. 681; Jennison v. Kirk, 98 U. S. 461;* and *Broder v. Water Co., 101 U. S. 276*; and concludes:

"It clearly follows, as the courts have certainly held, that when all cannot use the water without injury to the prior appropriator the other must yield to his superior right. The claim having been asserted that, when a party procured a patent for land, he would be entitled to the use of all waters flowing through the same, this was put at rest by the act of Congress of July 9, 1870, as follows: 'Sec. 17. All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights or rights to ditches,' etc. Since this act the rulings have been uniform that *the patentee of land has no claim upon the water flowing through the same as against a prior appropriator*, (citing cases).

"While there are numerous questions growing out of the water law, *we have aimed to confine the discussion to that involved in this case, which is simply a contest between a prior appropriator of the water of a stream, all of which he claims, has used and needs for a useful purpose, and a party who, since such appropriation, has entered and patented some of the land through which such water, by its natural channel, flows, and who claims its use as a riparian proprietor.*"

*Drake v. Earhart, 2 Idaho 750.*

This, then, was the state of the law when Idaho was admitted to the Union; an irrigation code taken from California, a statute conferring the right to the use of waters in riparian owners, and a single Supreme Court decision,

adopting in effect the California doctrine of modified riparian rights as established in *Irwin v. Phillips* and *Lux v. Haggin*. But in the constitution adopted in 1889, and which went into effect on July 3rd, 1890, a step in advance was taken. That instrument provides:

> "Sec. 1. The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.
>
> "Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water; * * * "
>
> *Idaho Const., Art. 15, Secs. 1, 3.*

These sections say nothing about riparian rights, but the use of water is declared a public use to be acquired by appropriation; it is no longer merely private riparian property where a question of priority of appropriation is involved. In other words a purely riparian right to the use of water may be defeated by a subsequent, as well as by a prior, appropriation, but does it follow that the doctrine of riparian rigths is "abolished *in toto?*" Let us continue our history for an answer to that question.

The doctrine of appropriation and of priority between appropriators, the public character of the use of waters, and the right of the state to regulate the matters involved in the application of the waters of the state to its development, are pretty well settled in the first ten or twelve years of statehood. *(See Wilterding v. Green, 4 Ida. 773; Geertson v. Barrack, 3 Ida. 344; Conant v. Jones, 3 Ida. 606; Malad*

*Valley Irrigating Co. v. Campbell, 2 Ida. 411; Sandpoint Water & Light Co. v. Panhandle Development Co., 11 Ida. 405; Boise City Irrig. & Land Co. v. Stewart, 10 Ida. 38.)* But no case involving rights of riparian proprietors seems to have come before the court until 1906, when in discussing the obstruction of a stream by a logging boom, the court uses this language:

> "The right of a riparian owner to use a stream implies the necessity as well as right to pass from the shore to the navigable waters of the stream, and this in turn must require some effective means or medium by which to reach such point for loading or unloading the floatable commercial ~~quantity.~~" *commodity.*
>
> *Powell v. Springston Lumber Co., 12 Ida. 723.*

This seems to be the first case in the Idaho reports which consciously recognizes a riparian right as such. But it is soon followed by others. In 1908, in *Johnson v. Johnson, 14 Ida. 561,* it is decided that a riparian proprietor takes title up to the thread of the stream, and the decision is expressly placed upon a recognition of the common law doctrine of riparian ownership. In arriving at its conclusion, the court speaks of the value of riparian rights, and the injustice of permitting the owner to be cut off from the stream, by the accrual of an intervening title to a reliction produced in the course of time by the recession of the shore line, "thus depriving the owner of the original shore estate of all riparian rights."

The next case arose over a contest as to the use of the shore line of Lake Cœur d' Alene. The riparian owner sought an injunction restraining a lumber company from dumping debris and sawdust thereon, and from booming and storing logs in front of her land. The court said:

> "The appellant cannot lawfully appropriate respondent's property to its own use in this manner. If it is in need of this water front for storage and boom pur-

poses, it must acquire the right to the use in a lawful manner. To allow it to appropriate and use the water front along the respondent's property in such a manner as to prevent her ingress and egress might deprive respondent of the principal use and benefit of her property, and take from the property its chief value. whether this right of ingress and egress is of any particular value to respondent or not, can make no difference to the appellant; it is a property right of respondent that must be respected, and she had a perfect right to resort to the court for the remedy she sought in this case."

*Shephard v. Coeur d'Alene Lumber Co., 101 Pac., 591 S. C. of Idaho, April 15, 1909; not yet officially reported.*

A few weeks after this last decision, this question of conflicting riparian and appropriation rights, was squarely presented and fully decided. The case arose over the use of the waters of Watson slough, which the jury found to be a natural watercourse diverting the waters of Snake river from their natural channel to a tract of land irrigated thereby. A man named Watson, the predecessor in interest of the defendant in the action, had made an appropriation for such irrigation in 1885, and had followed it by compliance with the statutory requirements. The plaintiff, Hutchinson, established his residence and acquired title to riparian land bordering upon the slough in 1891, and used it for several years for domestic purposes and watering livestock. The defendant, at the close of the irrigation season, shut down the gate at the head of the slough, and also dammed it up so as to prevent the water from flowing therein. To prevent this obstruction of the slough, the plaintiff brought suit for injunction. The plaintiff had made no appropriation of the water, and the question was thus squarely presented, what were his rights as a riparian proprietor? The court is careful to say that it was not a contest between

appropriators, nor between an appropriator and a riparian proprietor, because the irrigation season during which the defendant had the right to appropriate was closed; it was a contest between a riparian owner and an intermeddler with the stream. They then say:

> "A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a beneficial use. To this extent, therefore, the common law doctrine of riparian rights is in conflict with the constitution and statutes of this state and has been abrogated thereby.
>
> "Another question, however, must be considered in this case for the reason that although the appellants are appropriators of the water of the stream, and, indeed, of the entire volume thereof, still their point of diversion from Watson slough is at a point down the stream below respondent, and they are accustomed to carry the water by and through respondent's lands. * * * The query arises: Is there anything in the constitution of this state contrary or repugnant to the assertion by respondent of his riparian rights as against one who attempts to shut off the source of supply of the stream, and who does not found his right to do so upon the appropriation of such waters to a beneficial use? Section 18 of the Revised Codes is as follows: 'The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these Revised Codes, is the rule of decision in all courts of this state.'
>
> "As we have before seen, the common law doctrine of riparian ownership, whenever it comes in conflict with a water right acquired by appropriation, is at once in conflict with and repugnant to both the constitution and statutes of this state. We are unable, however, to find

any particular wherein it would be repugnant to any provision either of the organic or statutory law of the state where it does not come in conflict with a right acquired by appropriation in conformity with law. * * *

"Sight should not be lost of the correct principle involved in those cases, namely, that a riparian owner as such, acquires no right to the water flowing by or through his lands that is prior or superior to that of a locator, appropriator and user of such waters. In other words there is no such thing in this state as a riparian right to the use of waters as against an appropriator and user of such waters who has pursued the constitutional and statutory method in acquiring his water right. In order to acquire a prior or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters and divert the same as it is for any other user of water to do so. But a riparian owner still retains such right to have the waters flow in the natural stream through or by his premises as he may protect in the courts as against persons interfering with the natural flow, or who attempt to divert or cut off the same wrongfully and arbitrarily, and without doing so under any right of location, appropriation, diverson or use, and who do not rest their right to do so upon any right of use or appropriation. * * * The riparian owner's right to use the water for domestic and culinary purposes and watering his stock, and to have the water flow by or through his premises, is such a right as the law recognizes as inferior to a right acquired by appropriation, but superior to any right of a stranger, intermeddler, or interloper."

*Hutchinson v. Watson Slough Co., 101 Pac. 1059; S. C. Idaho, May 8, 1909; not yet officially reported.*

It should be noticed in this case, as in *Drake v. Earhart, supra,* the riparian rights attached subsequent to the appropriation, and we have no case which decides, upon a

point involved, whether or not a prior riparian proprietor could assert his riparian rights as against a subsequent appropriator. That is, of course, the case at bar. But we suppose that this Court will follow the very emphatic *dicta* in the Hutchinson case; and, in any event, it is not necessary for us to present that point for decision, because our hypothesis is that Schodde is an appropriator of the pre-existing riparian right, and does not base his claim solely upon the pure common law doctrine.

We are now in a position to summarize the law of riparian rights in Idaho from the foregoing decisions, which we think abundantly refute the defendant's assertion that the "common law doctrine of riparian rights is rejected *in toto*." Following our plan with respect to riparian rights generally, we submit the following propositions:

i. The owner of riparian land has all the common law riparian rights to the use and flow of the stream.

ii. These rights are property which he may protect in the courts, and for which one depriving him thereof must compensate him.

iii. These rights may be lost to an appropriator, who may subsequently acquire them, or the right to destroy them, without compensation, simply by complying with the law of appropriation. (To be consistent with general legal theory, this right of the appropriator must be placed upon the theory of waiver or non-claim by the riparian owner, whose rights are *in rem*. We can hardly speak of a property right, good against the whole world, which may be defeated by the hostile action of an unascertainable individual, proceeding without privity to the owner of the right. We think this position is of importance in connection with the following point.)

iv. The riparian owner may claim or "fix" his right in such a way as to prevent its subsequent appropriation.

This is accomplished by "appropriating" that right in the manner prescribed by the statute.

*(e.) Application of the foregoing rules to this case.*

Let us now apply the theory of riparian rights which we have developed to the plaintiff's case. The plaintiff, or his predecessor in interest, initiated his right to this land and water, in two of the cases stated in the complaint in 1889, and in the third in 1895. In each case he built his diversion works, wheels, etc., immediately after his appropriation, completed the same and applied the water to the land for several years before the defendant began the construction of its dam. (See transcript p. 2, Par. VII; p. 5, Par. 5; p. 7, Par. 5). Up to the time that the defendant began the construction of its works then, the plaintiff had the rights of a riparian proprietor, good as against everybody but an appropriator.

The riparian right upon which the plaintiff is insisting here, is the right to the current flow of the stream. Is there any such right, and if so, in what does it consist? That there is such a right, we think requires little argument to establish. The general rule, as stated by Chancellor Kent and approved by this Court, we have already given. (See pp. 6, 7 *ante.*)

For the sake of completeness a few cases may also be cited, and quotations made, in support of the text of the learned Chancellor.

> "*Prima facie,* every proprietor on each bank of a river is entitled to the land covered with water in front of his land to the middle thread of the stream. * * * In virtue of this ownership he has a right to the use of the waters flowing over it in its natural current, without diminution or obstruction."
>
> *Mr. Justice Story in Tyler v. Wilkinson, 4 Mason, 397; reported Fed. Cas. No. 14,312.*

Note in this connection that in *Johnson v. Johnson, supra*, the Supreme Court of Idaho recognized the title of the riparian proprietor as extending to the center of the stream, and it is this fact which is said by Justice Story to give the right to the current.

> "The general doctrine relating to water courses is, that every proprietor is entitled to the use of the flow of the water in its natural course, and to the momentum of its fall on his own land."
>
> *Weiss v. Iron Co., 11 Pac. (Ore.) 255.*

> "Every proprietor of land through which a water course runs, has a right to the use of the impelling force of the current for mill purposes, so far as they exist on his own land."
>
> *Gould v. Boston Dock Co., 13 Gray 442; per Shaw, C. J.*

> "The right to the use of running water is *publici juris*, and common to all proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use with those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current to drive mills."
>
> *Head v. Amoskeag Mfg. Co., 113 U. S. 19.*

So much for the existence of the right; now as to the nature of the right, its essence, in what it consists, we cite the following authorities.

> "The right to the use of the flow of the water in its natural course, and to the momentum of its fall, on the land of the proprietor, is not * * * an easement, because it is inseparably connected with, and inherent in, the property in the land; it is parcel of the inheritance, and passes with it."
>
> *Shamleffer v. Peerless Mill Co., 18 Kan. 33; per Brewer, J., quoting Angell on Watercourses, 96, 97.*

"As to the nature of the right of the riparian owner in the water, by all the modern as well as ancient authorities, the right in the water is usufructory and thus not so much in the fluid itself as in its uses, including the benefits arising from its momentum or impetus."

*Lux v. Haggin, 69 Cal. 255; See 10 Pac., l. c. 753.*

The nature of a riparian owner's right in the current is very clearly put in an early Pennsylvania case, the opinion being by Chief Justice Gibson. The plaintiff was the owner of a tract of land, mill and water power on a creek, and the the defendant was the owner of a tract of land, mill and water power, below the plaintiffs on the same creek. The plaintiff complained of injury from the erection of the defendant's dam, whereby the water was backed upon the plaintiff's land. The matter was referred to referees, to determine among other things, the damages sustained. On exceptions to the referees' report the court said:

"The water power to which a riparian owner is entitled consists in the fall of the stream when in its natural state, as it passes through his land, or along the boundary of it, or in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it. This natural power is as much the subject of property as the land itself, of which it is an accident; and it may, in the same way, be occupied in whole or in part, or not at all, without endangering the right, or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy or enjoyment for a period commensurate with the statute of limitations."

*McCalmont v. Whitaker, 3 Rawle 84; 23 Am. Dec. 102.*

Finally, this riparian right to the flow is a valuable property right, of which the riparian owner cannot be deprived

without his consent, or compensation being paid therefor, when it is desired to devote the right to a public use. This is so obviously implied in what we have said, that we simply cite the following additional authorities on the point.

*Yates v. Milwaukee, 10 Wall. 497.*

*Pine v. City of New York, 103 Fed. 337.*

*Kaukauna Water Power Co., v. Green Bay and M. Co., 142 U. S. 276.*

This, then, is the right which the plaintiff had when he became the owner of the land abutting on Snake river, or rather when he, or his predecessor in interest, made entry, for his riparian rights then attached. *(See Sturr v. Beck, 133 U. S. 541.)* The defendant confesses by demurrer that he has deprived the plaintiff of this right. Under the decision of the Supreme Court of Idaho in *Hutchinson v. Watson Slough Co., 101 Pac. 1059, supra,* the defendant can only justify by showing that it is an appropriator. But as the complaint does not allege the defendant's title or right, and the cause is here upon demurrer, no such justification can be urged. In other words, by showing that Schodde is a riparian proprietor we have made a *prima facie* case, which the defendant can only overcome, if at all, by showing that it is an appropriator, which has not yet been done.

We might close here, but we are willing to assume for argument's sake that the defendant is an appropriator, and on such assumption we contend that the plaintiff must still prevail as a riparian owner. We have shown that as a riparian owner, the plaintiff had title to the current good as against all but an appropriator. We further contend that he had the right to "fix" such right so as to prevent its subsequent appropriation, or its defeat by such an appropriation. Such a power is clearly implied in the *Watson Slough* case, where it is said: "In order to acquire a prior

or superior right to the use of such water, it is as essential that a riparian owner locate or appropriate the waters and divert the same, as it is for any other user of water to do so." In other words, our contention is that what was so clearly a riparian right at common law may be appropriated by a riparian proprietor under the Idaho law; that the difference between the Idaho law and the common law of riparian rights rests principally in the mode of acquisition of those rights. Under the common law the right attaches to riparian proprietorship, and continues as incident thereto whether it is ever used or not. Under the Idaho law the right exists, but to be secure against the higher law of appropriation, it must be appropriated, that is, beneficially used; the riparian owner cannot sit back and retard the development of the country by claiming a dormant right. If he wants the right, he must use it, and give notice to the world that he is using it, before some one else spends time and money in acquiring a similar right.

We submit, then, that Schodde had a riparian owner's right to the current; that he could fix that right by an appropriation to a beneficial use so as to make it available as against a subsequent appropriator, and that he did fix the right by such an appropriation. This last point involves a discussion of our second thesis, to which we accordingly now proceed.

*2. The plaintiff's current appropriation.*

In developing this branch of our case, we call attention to the double aspect of the argument advanced. We contend first, that by making the appropriation, the plaintiff "fixed" his riparian right, and, second, that independent of any riparian right he initiated a right by appropriation. Both these contentions involve the same facts, the same law, and substantially the same argument. The difference lies simp-

ly in the point of departure; the former assumes riparian ownership and is bottomed—to use a Missouri phrase—on a riparian right, while the latter ignores the common law foundation and starts from the law of appropriation. In establishing the former, we are simply completing our first thesis; in the latter we are developing the second.

The plaintiff's appropriations were made in 1889 and ~~1905~~, respectively. The law of appropriation as it existed in those two years was substantially the same, although in the latter year a statute was passed repealing by implication many of the sections of the Revised Statutes of 1887, which were in force in 1889. *See Laws 1895, p. 174; Rev. St. 1887, secs. 3155-3167.* But the general plan of appropriation prescribed by the act of 1895 was the same as that contained in the Revised Statutes. We will quote what bears on this point, placing the laws of the different years in parallel columns.

| REV. ST. 1887. | LAWS 1895, p. 174. |
|---|---|
| Sec. 3155. The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation. | Sec. 2. The right to the use of any of the public waters of this state may be acquired by appropriation, which must be for some useful and beneficial purpose; and when the appropriator or his successor ceases to use it for the purpose for which it was appropriated, the right of such appropriation ceases. |
| Sec. 3156. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases. | |
| Sec. 3159. As between appropriators the one first in time is first in right. | Sec. 3. Between appropriators the first in time is the first in right. |
| Sec. 3160. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:<br>1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four inch pressure, and accurately describing the point of diversion; | Sec. 4. Any person, association or corporation hereafter desiring to appropriate any of the public waters of this state must post a notice in writing in a conspicuous place at or near the place of intended diversion, which shall state:<br>First. That such person, association or corporation claims the water there flowing to the extent |

2. The purpose for which he claims it and the place of intended use;

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe or acqueduct in which he intends to divert it; a copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

of a certain number of cubic feet per second.

Second. The place of intended diversion, either by giving the legal subdivision of land or by reference to some prominent landmark.

Third. The purpose or purposes for which the water is claimed and the place of its intended use.

Fourth. The general course and length of the canal or conduit by which it is proposed to divert said water, and, if the appropriation is for irrigating purposes, a general description of the land proposed to be irrigated by such canal or conduit.

Fifth. The length of time necessary for the completion of the work, which shall in no case exceed five years. A copy of this notice must, within fifteen days after it is posted, be filed for record in the office of the recorder of the county in which it is posted, and a duplicate copy must be filed for record in the office of the State Engineer in Boise City.

Sec. 3161. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

Sec. 6. Within sixty days after the said notice is posted * * * the claimant must begin the construction by means of which he intends to divert said water, and must prosecute said work with all due diligence to completion: *Provided*, The work shall be completed within the time specified in the notice mentioned in Section 4 of this Act.

Sec. 3162. By completion is meant conducting the waters to the place of intended use.

By "completion" is meant having the proposed works completed so as to be capable of conducting the waters to the place of intended use.

Sec. 3163. By a compliance with the above rules a claimant's right to the use of the water relates back to the time the notice was posted.

Sec. 7. By complying with the above rules the claimant's right to use of water dates back to the date when the notice was posted. But in no case shall he have a right to the use of more water than said works are capable of carrying on to lands where it may be used for a beneficial purpose.

Other provisions of the statutes have no reference to the questions involved in this case. Such provisions of the constitution as are material *(Art. 15, Secs. 1, 3)*, we have already cited. (See *ante*, p. 17.) We might, however, add to the quotation from section 3, the following:

> "When the waters of any stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming the water for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. * * * But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of property for public and private use, as are referred to in Section 14, of Article 1 of this Constitution."

It will be noticed that the statutes of 1887 and 1895 are similar in their substantial requirements. The distinction between them is in matters of form and of phraselogy, rather than of substance. For our purposes, any differences are immaterial; the appropriations were the same under each.

Is there an appropriable element in the current of the stream under these statutes? If there is such an element, the acquisition of a vested right to its use may be called, for convenience, a current appropriation. Let us first consider in what this element must consist.

Water continually flowing from a higher to a lower level may be made use of as a motive power either in virtue of its potential energy (energy of position above the ground, obtainable by permitting it to fall), or by allowing it to descend and making use of the kinetic energy, or energy due to its velocity. The work per second, P, which a stream can perform because of its fall, h, is $P=Qwh$, Q being the quan-

tity of water per second, and w the weight of a unit of volume (w=62.4 lbs. per cubic foot). The work performed because of velocity is obtainable by the formula $P=Qw\frac{v^2}{2g}$, v being velocity, and g the numerical equal of the velocity acquired by any body falling freely in a vacuum from a state of rest in a second of time, (g=32.16 when the foot is the unit of distance). But as water will attain a given velocity, v, only after having passed through a sufficient height, and v is determinable by the formula $v=\sqrt{2gh}$, it follows that $h=\frac{v^2}{2g}$, and the formula for kinetic energy may be given in the same form as above given for potential energy.

The motive power of water is utilized in practice either by the agency of water-wheels, turbines, rams, or hydraulic engines. The agency adopted by the plaintiff in this case was an undershot water wheel which directly converts the kinetic energy of the water into mechanical work. The wheel is provided with float boards placed at right angles to its circumference, the lowest two of these boards at least being immersed in the water, which flows against these immersed boards, moving them, and causing the wheel to revolve, by its impact. There are different varieties of these wheels; the midstream, the common undershot, and the Poncelot. The ones constructed by the plaintiff seem, from the allegations of the complaint, to be the common undershot whels, being confined in an artificial channel, created by the wing dams deflecting the current to the wheels, thus raising the level of the water and increasing its velocity. The power developed by such a wheel may be ascertained by the formula, HP=.0006qh, remembering that $h=\frac{v^2}{2g}$. The work performed by the plaintiff's wheels was the raising of water to the level of his land for irrigation. See:

*Irrigation Engineering, Wilson, 5th Ed., John Wiley and Sons, New York, 1905, pp. 499-505.*

*Ganot's Physics, 17th Ed., Longmans Green & Co., London, 1906.*

*VIII Americana Encyc., Tit. Hydraulic Engineering.*

From the foregoing it appears that a running stream, or current, contains, at a given point, a certain amount of energy for use and development for various purposes, among which is the raising of water to the level of adjacent land. The water which it raises, is appropriated for irrigation, and with it we are not concerned, for so much of the plaintiff's appropriation is admitted to be valid. But in addition to the water so raised, the wheel uses so much of the kinetic energy residing in the water of the stream, as is necessary to raise the water appropriated for irrigation to the height of the flume. This is a use of the impelling force of running water, for the generation of power. It is a use of the current of the stream, and an acquisition of a right to such use is a current appropriation.

We may thus define a current appropriation as the legal acquisition of the right to use the impelling force of running water resulting from the momentum of its fall, for the purpose of performing work.

May there be such an appropriation? There is no question but that it was a protected use—a property right—at common law. Referring to the cases we have previously quoted, (*ante*, pp. 24-25) we find such expressions as "use of flow," "momentum of fall," "impelling force of current," "power inherent in fall," and "natural power," as describing the right of the riparian owner. The law of appropriation seems no less certain. It is said in the statutes above cited, "The right to the use of running water flowing in a river or stream," "The right to the use of any of the public waters of this state," etc., may be acquired by appropriation, "for some useful or beneficial purpose."

That the water itself is not used or exhausted, makes no difference, because it is one of the essentials of a legitimate use of water for power purposes, that the appropriator turn the water back into the stream, when his use has been satisfied.

*Weiss v. Oregon Iron and Steel Co., 11 Pac., 255.*

So in a case previously cited, it is said:

> "When properly used as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Any number of riparian proprietors can use the water as a motive power in succession, without substantial injury to any other, for the element is just as good for the purposes of the last, as for those of the first, proprietor."
>
> *Bear River v. New York, Etc. Co., 8. Cal. 327.*

And in another early California case:

> "We presume that it is not to be doubted that the defendants having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for these purposes to the exclusion of any subsequent appropriation of it for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would by grant. * * If A erects a mill on a running stream, this shows an appropriation of water for the mill; but, if he suffers a portion of the water, or the body of it, after running the mill, to go down its accustomed course, we do not see why persons below may not as well appropriate this residuum, as he could appropriate the first use."
>
> *Ortman v. Dixon, 13 Cal. 33.*

We think this language is squarely in point. The right of appropriation, is analogous to the common law right arising from grant (or prescription presupposing a grant)

from the riparian proprietor. The appropriation is made by erecting the mill, and using the water, but any one else may use the water thereafter. This is exactly what we contend here. The right of appropriation exists where there was a common law right, subject to grant; the appropriation was made by the erection of the wheels and use of the water, and the defendant could only appropriate the residuum after the plaintiff had made his use of the water.

In a recent Utah case, the right to the use of water for the generation of power, the corpus of the water itself to be returned to the stream for the satisfaction of agricultural appropriations, was sustained as a "secondary appropriation."

*Salt Lake City v. Power Co., 24 Utah 249; 61 L. R. A. 648.*

In Washington the right to appropriate water for the operation of a flour mill was sustained.

*Isaacs v. Barber, 10 Wash. 124; 30 L. R. A. 665.*

In a leading case this court has said:

> "Ever since that decision *(Tartar v. Spring Creek Water and Min. Co., 5 Cal. 397)* it has been generally held throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases, the right of the appropriator, exercised within reasonable limits, is respected and enforced."
>
> *Basey v. Gallagher, 20 Wall. 670.*

We think that we need follow this line of thought no further. The defendant practically concedes that there is an appropriable quantity in the current of a stream. In

counsel's brief, it is said: "Whatever may be said of a location of power rights upon a stream, a beneficial use of which for these purposes is well recognized," etc. *Respondent's Brief on Certiorari, pp. 16-17.* We have shown that such undoubtedly existed at common law in the form of a riparian right, and that the right is recognized by courts maintaining the doctrine of appropriation. In addition much state and national legislation, and administrative action, is based on the assumption that there is a right obtainable in the velocity or fall of the waters of a stream. Cities and communities are built up and developed on the same assumption. If any additional argument is necessary on this point, we think it should come from the other side.

But the real issue between us and the defendant here is not so much on the right to appropriate as upon actual appropriation. Did Schodde make such an appropriation as is here claimed? This we affirm, and this the defendant denies. The question is a mixed one, involving both fact and law.

As to the facts: They are stated in the complaint on Page 2, Paragraph VII, Page 5, Paragraph 5, and Page 6, Paragraph 7, of the Record. In each paragraph the recital is the same except as to dates and figures, so we may take the first mentioned as typical, and for the sake of accuracy and convenience, we give it in detail.

> "That on or about the 18th day of August, 1895, the plaintiff appropriated fifty second feet of the flow of the waters of said Snake river for use upon his said land, and did as soon as practicable after making said appropriation and at a cost to plaintiff therefor of more than $6,200, build and erect three water wheels in said Snake river, near the south bank thereof and westerly from said lands of plaintiff, and upon the legal subdivision immediately adjoining said lands upon the west, two of said wheels being thirty feet in height, and the other of said wheels being thirty-four feet in height,

and constructed two wing dams in said river, each of said wing dams being more than two hundred feet in length and so built and constructed as to confine the flow of the waters of said river to the southerly bank thereof, and to raise said water three feet or thereabouts above the natural height of the waters of said river directly above said water wheels and each of them, and thus caused said wheels and each of them to revolve and by means of buckets fastened thereon, to lift water to the extent of five second feet and empty the same into flumes adjoining said wheels, by which it was carried into ditches and applied to the land for irrigation purposes."

If it is possible to appropriate the right to use running water to perform work, it would seem that the acts above detailed constitute such an appropriation. We are unable to see what further could have been done. The plaintiff built wing dams deflecting the natural current of the stream into an artificial channel, *i. e.* in a different direction than it otherwise would have run though still within the natural banks of the stream; he raised the natural level of the waters so as to create an artificial fall, thus using the flow of the water to generate energy; he built wheels to which the energy generated by his apparatus could be applied; he used the energy which he thus generated for the beneficial purpose of raising water to irrigate his land.

This seems to us so obviously to be an appropriation, that the only argument which we can advance is to endeavor to refute the argument by which the Court of Appeals, following the defendant's brief, arrived at the conclusion that it was not. We pursue the analysis which we made under our second point.

*(a.) No notice of intention to appropriate the current was necessary.*

The Court of Appeals say: "It thus appears that the law of appropriation requires that the appropriator shall post a notice at the point of intended diversion, of the quantity of water claimed. * * * In none of these requirements did the plaintiff comply with the law in appropriating the current of the river. He did not notify the world that he made such a claim." *(Transcript p. 30.)*

The record does not contain the notice, but we will assume, for argument's sake, that the notice was defective, or was absent, as stated by the court. The fact is altogether immaterial. There is no conflict of authority on this point; it has been decided the same way by every court in the west. The leading case is *Welles v. Mates, 99 Cal. 583; 34 Pac. 324.* There it is held that the provisions of the statute requiring posting of notice, and other preliminary formalities, are binding only where one desires to secure the benefit of relation back to the posting, and that an actual appropriator, who completes his appropriation prior to the posting of notice by a subsequent appropriator, acquires priority over the latter, although he failed to post notice or otherwise comply with the formal requirements of the statute.

This rule has been expressly followed by the Supreme Court of Idaho.

*Pyke v. Burnside, 8 Idaho 487.*
*Sandpoint Co. v. Panhandle Co., 11 Idaho 405.*
*Brown v. Newell, 12 Idaho 166.*

In the case last cited, it was held that where an actual appropriation was made, the rights of the parties were measured thereby, and any defects in the posted notice were immaterial. Thus whether our original notice was deficient, or was totally lacking, is immaterial for our complaint

shows a completion of the appropriation works and application of water to the intended use, many years before the defendant's rights, whatever they may be, attached. In fact the record does not show that any such rights ever have attached.

*(b.) The diversion of the current was sufficient, if any was required.*

The next point made by the Court of Appeals is that there was no actual diversion of the water. The court says little upon this point, but the principal portion of the defendant's argument is devoted to it. *(See Respondent's Brief on Certiorari, pp. 17-24.)* It is contended that there must be a diversion to constitute an appropriation, and that there has been no diversion of the current in this case.

As to the first proposition, that there must be a diversion, we have little to say, except that the authorities cited by the defendant on the pages of the brief referred to are utterly without application to a case of this kind, and involved conditions under which an actual diversion from the banks of the stream was necessary to put the water to the use intended. The true rule as announced in these cases is summarized in the latest work on waters in these words:

> "While the statutory formalities are thus dispensed with in favor of an appropriator by actual diversion, that is as far as the law goes in dispensing with formalities. The law recognizes no right flowing from merely settling on the banks of a stream. A settlement on the banks does not constitute an appropriation where nothing more is done. Aside from the question of riparian rights, elsewhere considered, the settlement does not *per se* give any right to the water."
>
> *Wiel, Water Rights, 2nd Ed., 110.*

In other words, as a rule, diversion and use of the water are necessary correlatives. Ordinarily, no use can be made without a diversion. But even this modest requirement is

not very rigorously adhered to in Idaho. Thus in *Hill v. Standard Min. Co., 12 Ida. 223*, an action to enjoin a mine owner from dumping debris into a stream, it was contended that the plaintiff had made no appropriation of the waters of the stream, and hence had no ground of complaint for injury to them. But the Court said, "So far as the record shows, appellant's lands may produce crops by sub-irrigation, hence never necessary to make an appropriation of the waters of the stream." In a later case, a still more significant holding was made. In the syllabus, by the court, the following point is made:

> "The fact that a stream in its original native condition was dammed so as to cause the waters to percolate through and sub-irrigate adjacent meadow lands will not of itself justify the owners of such lands in maintaining the stream, dammed in such condition, to the injury of other appropriators, but may, on the other hand, be sufficient to initiate a right for the quantity of the waters of such stream adequate for the surface irrigation of the lands previously so sub-irrigated therefrom."
>
> *Van Camp v. Emery, 13 Idaho 202.*

That is to say the actual use of the water for irrigation initiates a right to such use though no diversion is ever made. Thus the broad general statement that a diversion is necessary, is only qualifiedly true, at the best, in Idaho.

But the Supreme Court of Idaho has so squarely decided that such acts as the plaintiff performed here do constitute a diversion, that we do not need to contend that a diversion is not necessary, but merely take issue upon the proposition of fact advanced by the defendant, and assert that a legal diversion was made.

In the case of *Idaho Power and Transportation Co. v. Stephenson, (101 Pac. 821; S. C. Ida., Apr. 30, 1909, not yet officially reported)*, the question arose as to whether

a power company, which had constructed its dam across a river, raising the water by means of the dam to an artificial level, and discharging the water through the dam onto water wheels on the lower side thereof, but within the natural bed of the stream, should pay fees as for a "diversion" of the water. The Court said:

> "It will not be questioned but that the use to which the plaintiff has sought to apply the water referred to in his complaint is a beneficial use, but counsel contend that said act contemplates the diversion of such water from the natural channel into a ditch, flume, or some other conduit, taking it out of its natural channel, and that, unless such water is taken out of its natural channel, the fees * * * cannot be charged. * * * We concede that if no change is made in the flow of said water, it is not changed from its natural state as it flows down the stream, that it is not diverted from its natural state; but whenever its natural condition is changed, and it is taken from its natural flow in the stream and applied to a beneficial use, the law steps in and provides the procedure and the things to be done and the fees to be paid in perfecting its appropriation. * * * It (the petitioner) has diverted it from its usual way of flowing down the stream, and we are clearly of the opinion that under those facts the plaintiff is required to pay the same fees as it would have to pay provided it had diverted from its dam the water used in its works by a ditch or flume and carried it for a distance on the bank of the river and then turned it into its penstock, and through that onto its water wheels and back into the river. * * * While the conduit through which the plaintiff conducts the water from its dam to the place of use is not strictly a 'ditch' or a 'canal,' it is a conduit through which the water is diverted from the natural channel in which it would flow if left unobstructed."

If, in connection with this case, the case of *Salt Lake City v. Salt Lake Water and Power Co., supra,* be read, the

validity of this appropriation on the point here under consideration is, we think, clearly made out. In the latter case a diversion away from the stream was involved, but under the Idaho case just cited, that circumstance is immaterial. We have made a diversion within the meaning of the law, when we changed the natural course of the flow of the stream.

The plaintiff made all the diversion which the nature of the case required or permitted. He deflected the current; he raised the surface; he erected the wheels which transformed or utilized the power. Suppose he had done what the defendant here claims, evidently, that he should have done, viz., dug a ditch to one side of the stream, capable of carrying enough water to run his wheels and to irrigate his land, and emptying the water which he did not use, back into the stream below the wheels. It would have cost him several thousand dollars more, but would have given no better service, and when the defendant erected its dam, the back water would as surely have stopped his wheels, and destroyed his power as it did in the case at bar. But the defendant could not have contended under those circumstances, that his diversion and appropriation was not complete, at least not under his present argument, for he could not contend that he had unreasonably appropriated the whole river, nor that he failed to divert the water, nor that he was not putting what little water he diverted under those circumstances to a beneficial use.

*(c.) The water required to satisfy this current or power appropriation was applied to a beneficial use.*

The final ground upon which the Court of Appeals denied the appropriation of the power in the current, was that the plaintiff "did not apply it to the soil as required where the appropriation is for the purpose of irrigation." *(Transcript*

*p. 30.)* But if we have made it clear that this power was applied to the turning of the wheels; that that was the use or purpose for which the power appropriation was made, and that an appropriation for that purpose is authorized by the law, we have answered the court. If the appropriation was, in this respect, made for the development of power, the water or energy taken from the water, need not, and could not, without committing the forbidden waste, be applied to land.

The argument of the defendant on this point is more complex and involves other considerations. It is contended that "any use of the water for an unreasonable purpose, or to an unreasonable extent is not a use for a beneficial purpose." *(Respondent's brief on Certiorari, pp. 27-28.)* It is previously urged in the same brief, *(p. 24)* that "the appropriation as claimed is void because it is unreasonable", and, we might also mention as the questions are allied, that it is void, because "uncertain and indefinite." *(ib. p. 26.)* We will consider these contentions in their order, and as they are the support of the argument that the appropriation is not for a beneficial purpose, we need not again mention it specifically.

*i. The use is not unreasonable.*

We agree with the defendant that all use of water must be reasonable, whether based upon a riparian right or upon an appropriation, but we cannot follow him to his conclusion that a use which leaves the river exactly as it was found, taking for the moment only a few horse-power from its current, and turning the water immediately again into that current, is an unreasonable use, as against a claim to absolutely destroy the current and power latent in the stream, and to monopolize the whole thereof. By the common law, the reasonable use is that which most nearly conforms to

natural conditions; under the law of appropriation, the reasonable use is that which is necessary to accomplish the beneficial result aimed at, without wasting water.

> "A reasonable use of a stream for mill purposes is one adapted to the character and capacity of the stream. In determining this capacity its condition throughout the year is to be considered. A reasonable use must permit the water to flow in its accustomed way as far as this can be done, and a beneficial use, though a limited one, to be made of the reduced stream, each riparian mill owner having his fair proportion."
>
> *Mason v. Hoyle, 56 Conn. 255.*

This is the common law rule, and follows from the maxim *"Aqua ourrit,"* etc. For the rule in the arid states, let us take the authorities cited by the defendant in the brief previously quoted from. *(pp. 25-26.)*

> "It must be exercised with reference to the general conditions of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.'
>
> *Basey v. Gallagher, 20 Wall. 670.*

Who has the monopoly of the current in the case at bar, the plaintiff, who leaves the current in its natural condition, after extracting from it a few horse-power, or the defendant who destroys it absolutely?

In the case next cited it is said that "dams and reservoirs must be kept within reasonable limits." In other words natural conditions may be changed, yet not more than is necessary. It was held that the defendant could not dam a canyon to such a height as to interfere with the prior location of a railroad right of way. Could not the same holding be applied favorably to the plaintiff's case here?

*Rio Grande R. Co. v. Telluride P. & T. Co., 16 Utah, 137; 51 Pac. 146.*

But these cases really are applying the riparian rights doctrine in a modified form. The test under the law of appropriation is necessity for the purpose in hand, and if the purpose is a lawful, *i. e.*, beneficial one, whatever is necessary is reasonable. We quote again the cases cited by the defendant at the same place.

> "But whatever he may be irrigating, he is only entitled to the amount he needs, economically and reasonably used, and when he has that he cannot prevent others from using the surplus."
>
> *Roeder v. Stein, (Nev.) 42 Pac. 867.*

> "The rights of prior appropriators must be confined to a reasonable and necessary use. * * * No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation."
>
> *Barnes v. Sabron, 10 Nev. 243.*

> "The amount of water appropriated must be restricted to the quantity needed for the purpose."
>
> *Nevada Ditch Co. v. Bennett, 60 Am. St. Rep. 787.*

> "The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. * * * The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and to prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist on the flow of the water without deterioration in quality, where

such deterioration does not defeat nor impair the uses to which the water is applied. * * *"

"What deterioration in quality or diminution of quantity will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. * * * In all controversies, therefore, the question between him and the parties subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

*Atchison v. Peterson, 20 Wall. 507.*

We also call attention to the case of *Kirk v. Bartholemew, 3 Idaho, 367,* where the court emphatically sustained the right of prior appropriation to the extent of necessity in each case as determined by "the land susceptible of irrigation * * * and the water necessary to irrigate the same," as against an attempt to distribute the waters so as to do the most good to the community as a whole, and says that the law of priority "must be enforced as long as it remains the law, even if harsh and unjust."

Under these authorities, then, the test is necessity under the circumstances. It is simply an expression of the rule against waste. The plaintiff here alleges that this power is necessary in order to irrigate his lands, for he says "that said water in said amount is necessary for the successful cultivation and irrigation of said land," *(Record, pp. 2, par. VII; 5, par. 5; 7, par. 7)*; and "That there is no other supply of water available for use upon said lands of plaintiff except waters from said Snake River raised as aforesaid by said water wheels." *(Record, p. 4, par. XII.)*

Will the court take judicial notice that this allegation is false; that water can be placed on the land in some other way, and that therefore the power claimed is not necessary?

We think not. The question whether or not it is necessary is one of fact, to be determined by the circumstances in each case, and by a verdict of the jury. This is the language of a recent author:

> "The amount necessary for a beneficial use is a question of fact in each case. It is not to be determined by rule or presumption, but by the evidence each case presents to the court or jury. Evidence will be received of the number of acres irrigated and of the needs per acre, and of the custom of the locality."
>
> *Wiel, Water Rights, 2nd Ed., sec. 170, p. 266.*

The essence of the defendant's claim is that the plaintiff has settled upon land where the duty of water is very low; that a great quantity is required to do very little work, and that consequently one who has selected lands or appliances by virtue of which he can do more work with the same water, can destroy the plaintiff's prior appropriation on the theory of the greatest good to the greatest number. This argument ignores the test of necessity and makes water rights a more precarious commodity than the defendant would be willing to admit to its own settlers. Carried to its conclusion it means that every water right, though first in time, is subject to the contingency of another person discovering land or appliances upon or by which he can increase the duty of water, and destroy the other's priority.

However, we have followed the defendant too long in our desire to fully meet him on his own ground. His argument is not only unsound in law, but ignores the facts. Thus it is said: "In the case at bar an entire river is claimed as against the public represented by the defendant. Of the river flow some 1250 inches is used upon the lands, and the remainder, sufficient to irrigate and reclaim 300,000 acres, is not used except to raise the 1250 inches to the level of some 25 feet." *(Brief on Certiorari, p. 24).* But this

is not the case; the plaintiff appropriated but a very small part of the flow of the stream; or of the current. Nor was it necessary to keep the water always at the same level so that no one else could appropriate any of the water. The wing dams were intended for the very purpose of altering the natural level of the waters and impounding enough water long enough to turn the wheels, and then returning it to the river channel. After the water left the plaintiff's wheels, it was subject to indefinite future appropriation, either for power or irrigation purposes. The defendant seems to contend that simply because the water could not be appropriated in the way that it appropriated it, without destroying the plaintiff's right, it was exhausted and could not be again appropriated in any other way. But in fact, all the water in the river beyond what was needed to supply the plaintiff under mathematical formulae, could be taken in any other way than that in which the defendant takes it, without damaging the plaintiff. In other words the defendant claims that the plaintiff has no rights simply because, had he such rights, the defendant could not have made its appropriation in the particular way that it did make it.

*ii. The appropriation is not indefinite.*

The question which we have just discussed brings us to the final question urged by the defendant, that the appropriation is void because indefinite. The contention is, as in the preceding case, that the plaintiff has used the whole river, or rather that he requires the whole river, while our contention is that he uses and requires only a small, definitely ascertainable part of it.

*In limine,* we observe that the fact that the plaintiff did not prospectively compute or ascertain, and has never computed or ascertained, the exact amount of water that his

wheels require, does not affect the validity of his appropriation. Thus in a Washington case it was held that an appropriator was not deprived of his rights by the fact that he did not describe a definite measurement of what he used, nor furnish clear and satisfactory evidence of the amount required to satisfy his right.

*Longmire v. Smith, 26 Wash. 430; 58 L. R. A. 308.*

The same idea is embodied in the case of *Van Camp v. Emery*, previously cited, where the Supreme Court of Idaho said that even the indefinite use made by sub-irrigation might be sufficient to initiate a right to the amount actually needed.

The indefiniteness then which will avoid an appropriation, is indefiniteness in the amount of water actually appropriated, required and used; not that it is an unascertained quantity, but that it is unascertainable. Conceding the fact, we have found no authority which establishes the law as claimed, under the doctrine of actual appropriation and beneficial use. But we think the facts do not call for the application of any such rule, should one be established. We have already mentioned that it was the use of running water to perform work and not water itself, which was really appropriated, and that the amount of power generated by the water was definitely ascertainable by the formula HP= .0006qh; q being the quantity of water in cubic feet per minute and h the head of water in feet. (See *ante*, p. 30.) Now had any person been interested in determining exactly what water the plaintiff required at any one wheel to satisfy his right, it would have been a simple matter to have ascertained the power required to raise the water appropriated for irrigation upon the land, and reverse the formula so that it will read, $q=\frac{HP}{.0006h}$, from which such quantity so required is determinable.

It thus follows that there is no indefiniteness in the appropriation. The error in the defendant's position, as we see it, is that it assumes that because it cannot destroy the whole flow, therefore the plaintiff has appropriated the whole flow, notwithstanding the fact that after consuming such water as is necessary to irrigate his land, the plaintiff leaves the whole flow in the river for any one else to use in any way possible except the way in which the defendant has used it, viz., by destroying it.

We submit, then, that we have established the thesis that the plaintiff has made a valid appropriation of the right to use a sufficient quantity of running water to turn his wheels and develop the power which he has been wont to take from the river; that no notice of such appropriation was necessary, that there was a sufficient diversion of the waters of the current, and that the appropriation was beneficial, reasonable and definite.

*3. Means of utilization as a part of appropriation.*

The Court of Appeals held that "the claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is likewise untenable," *(Record, p. 30)*; and that "the claim that the right to the current of the river is appurtenant to the water location is contrary to well established principles of the common law governing such a relation." *(Record, p. 28.)*

This is immaterial if the court shall hold that the plaintiff's power appropriation is in and of itself complete and valid, as we have heretofore contended. But if this is not regarded as established, we think still that the plaintiff has stated a cause of action, because the means of utilizing his admittedly valid water appropriation, was an incident of, or appurtenant to, that appropriation.

In the first place, it should be noticed, that at the time of

his appropriation, and prior thereto, the current flowed over the plaintiff's own land, he having title to the center of the stream. See *Johnson v. Johnson, supra.* This title to the bed of the stream up to the thread thereof, made the current as it flowed over the land, appurtenant to the land.

*Hill v. Newman, 5 Cal. 445.*

*Farmer v. Ukiah Water Co., 56 Cal. 11.*

*Lower Kings River Water Co. v. Canal Co., 60 Cal. 408.*

*Chauvet v. Hill, (Cal.) 28 Pac. 1066.*

The plaintiff, then, being the owner of this current as an appurtenance to his land, and having a property interest therein, as against all but appropriators, by virtue of his riparian right alone, *(Hutchinson v. Watson Slough Co., supra)* made an appropriation of water for irrigation, to be made available by means of the application of the current to certain water wheels erected by him. The statute then (and now) in force expressly conferred the right to make the appropriation available in this manner.

> "All persons, companies, and corporations, owning or having the possessory title or right to lands adjacent to any stream, have a right to place in the channel of, or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level upon the banks, requisite to the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others for conducting said waters, may be acquired in the manner prescribed in the last two sections."
>
> *Rev. St. 1887, Sec. 3184; Rev. Codes (1909) Sec. 3303.*

Why, then, does not that which was originally appurtenant to the land, become appurtenant to the water right when it is utilized to make that water right effective, and

beneficial to such land? It will be seen that we are very close to the starting point of "fixing" a riparian right. Because, says the Court of Appeals, quoting Lord Coke, "A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." *(Record, p. 29.)* But while this is usually true of appurtenances, we do not think it is the ultimate criterion by which their existence is to be determined. Let us examine a few definitions and examples.

> "An appurtenance is a thing belonging to another thing as principal, and which passes as incident to the principal thing."
>
> *1 Words and Phrases, 477.*

> "Webster gives as the first meaning of appurtenance, 'that which belongs to something else; an adjunct; an appendage; as small buildings are the appurtenances of a mansion.'"
>
> *Carpenter v. Leonard, 5 Minn. 155.*

> "It is of broader significance than annexed, which is defined to mean, joined at the end, connected with, affixed."
>
> *Dauphin Co. Treas. v. St. Stephen's Church, 3 Phila. 189.*

> "Appurtenant agrees with the term appendant in nature and quality of its properties, but differs in that the commencement of the former is known, while the latter has belonged to the thing more worthy beyond the memory of man."
>
> *Leonard v. White, 7 Mass. 6.*

> It is a "thing used with and related or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant."
>
> *1 Words and Phrases, 479.*

> "Appurtenants are not necessarily of an incorporeal nature, but things corporeal may be appurtenant. If one has a house and land, and conveys water to the

house by pipes through the land, and afterwards sells the house with the appurtenances to one, and the land to another, the pipes pass with the house, because they are necessary and *quasi* appendant thereto."

*Jackson v. Striker, 1 Johns. Cas. 284.*

"The word appurtenance has no inflexible meaning, but must be construed in connection with the nature and subject of the thing granted. A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected in the use and enjoyment of the latter."

*Lawrence v. Hennesy, 165 Mo. 659.*

Thus it will be seen that the primary meaning of appurtenance is rather a thing dependent upon, or necessary to the use or enjoyment of, another; it is inferiority of use rather than difference in kind, which marks one thing as appurtenant to another. Bouvier, in his Law Dictionary, gives several instances, in which land incident in use to other land, passed as appurtenant thereto, and personal property, such as ship's boats, passed as appurtenant to the ship. See:

*Bouvier, L. Dict. 159, Tit. "Appurtenance."*

We cite the following case, as quite in point:

"Where a water power is granted together with all the privileges and appurtenances thereunto belonging, by virtue of the phrase 'privileges and appurtenances' the grantee has the right to maintain the dam at the same height as that at which the grantor had the right to maintain it, or, in other words, it imports a conveyance of all the water power privileges which the grantor owned."

*Daniels v. Citizens' Inst., 127 Mass. 534.*

In Idaho, water is declared to be the property of the State, the statute providing:

"All the waters of the state when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed."

*Rev. Codes, Sec. 3240.*

The nature of the ownership of water by the state is quite fully discussed in the recent case of *Speer v. Stephenson, 16 Idaho, 707*, where the constitutional and statutory provisions are set forth and reviewed. A full discussion of the whole question may also be found in *Wiel on Water Rights, 2nd Ed., Sections 34-36.* It is enough for our present purposes to say that by the authorities, the right to the use of water is acquired by appropriation which the State may regulate but not deny. Until appropriation is made, the waters are public and the State holds title as a sovereign for the benefit of the people, and may regulate the mode in which such appropriation must be made. When appropriation is made conformable to such mode, there is a grant, or *quasi grant*, of a portion of the public right to the individual making the appropriation. This is the meaning of the Stephenson case, and is the theory on which the present appropriation law of Idaho, as set forth in that case, is based. It must be remembered that we are dealing here with the right acquired by appropriation, and not with the plaintiff's antecedent riparian right. This right must conform to the regulative conditions imposed by the State. When, then, the State granted this right to the plaintiff, or, if "grant" be too technical a term, when the plaintiff acquired that right by the acceptance of those conditions, the State also impliedly granted, or the plaintiff impliedly acquired, the

appurtenant right to utilize the current by means of his wheels—a right legally inferior to, and necessary to the use and enjoyment of, his water location. It was a necessary incident, and therefore an appurtenance, to his right.

The Court of Appeals construes the statute above quoted *(161 Fed. 43)* as conferring the right to erect these wheels as a mere license. In answer to this position, we repeat what we said in our brief on Certiorari: A mere permissive right to erect rams or wheels in the stream would exist independent of statute. It is a privilege which has been exercised both under the common law and under the law of appropriation from time immemorial. And we think it would require no great amount of historical research to show that it is a privilege which has been exercised by riparian proprietors in all nations and at all times, and under all systems of law. It would certainly seem a work of supererogation for the legislature to grant, by solemn statutory enactment, a mere permission which has always existed independent of statute.

This construction of the statute further ignores the concluding clause which authorizes the condemnation of adjacent lands for ditches to conduct water from the point at which the wheel or other elevating device is placed. Would it not be absurd for the legislature to authorize the construction of an expensive device for elevating water above the banks of a stream, and the condemnation of land belonging to other and disinterested parties, for the distribution of the water, and then to permit the absolute destruction of all these works, and the waste of the land dependent thereon for its water supply, without any compensation or redress?

But further, the decision ignores the principles so often announced that a license such as this, when acted upon and so to speak executed, becomes irrevocable on the part of the grantor, and ripens into a right on behalf of the grantee.

In any event a third person cannot interfere with the enjoyment of the license while it is still unrevoked.

We have perhaps said enough to support our position in point of legal theory, but the opinion of the Court of Appeals on this aspect of the case seems to us so momentous in its consequences, should it be sustained, and so opposed to the theory of the law of appropriation, that we think its practical bearings should be further considered.

The position is, in brief, that the means of utilizing an appropriation is not incident to the appropriation; is neither a part of it, nor appurtenant to it. In consequence of this, one whose right is rendered totally unavailable by destruction of the means of utilizing his appropriation, has no redress so long as sufficient water is left in the river to satisfy the mathematical requirements of the appropriation. A water right thus becomes the right to have a certain quantity of water flow in the river past one's premises, and to use if he can get it; not a right to the use of water through the means adopted to obtain such use, even if those means be the only ones available to make such use possible. We do not think this proposition tenable under any conditions.

The statutes contemplate that water shall be taken out to satisfy the right at a certain place, and by a certain means, both of which are a part of the appropriation, or appurtenant to it. Thus in Section 3160 of the Revised Statutes of Idaho, and Section 4 of the 1895 law quoted above (pp. 28, 29) it is provided that the notice of appropriation must be posted at or near the place of diversion; that it must describe the place of diversion, and (Revised Statutes only) the means of diversion. The 1895 law requires, if the means of diversion is a ditch, that it be described. These requirements are as emphatic as that the quantity of water claimed shall be stated. It is further provided that

the point of diversion may be changed if others are not injured by the change *(Rev. St. of Idaho, 1887, Sec. 3157)*, under which provision it is held that the change cannot be made if another is injured.

*Hill v. Standard Min. Co., 12 Ida. 223;*
*Walker v. McGinnis, 8 Ida. 540.*

It may also be stated, that as a matter of universal practice, so far as our experience goes, a decree adjudicating water rights, awards a right to a certain quantity of water measured and diverted at a certain point. The case last cited illustrates this point.

If, then, one acquires by an appropriation, a right to divert only at a given point, he must acquire the right to divert at that point by the use of the means of diversion required by the local conditions there existing. No one of these elements of appropriation can be taken from him by a subsequent appropriator more than another. Each is equally a part, or appurtenance, of his appropriation.

We think that any other construction of the law is impossible, on practical grounds. The case at bar affords as good an illustration as could be found. The plaintiff made his appropriation at a convenient place; selected the only means of diversion possible, and expended large sums of money in making the same effective. A subsequent appropriator adopts the means of diversion most favorable to him, and the only means that could destroy the plaintiff's right, and says that because the two cannot stand together the plaintiff's must give way. Suppose that the plaintiff had constructed a ditch immediately below the point where the defendant's dam now stands, taking the water out at a point of elevation somewhere near the low water surface, so as to get a sufficient fall; could the defendant have impounded all the water in the river, except the 1200 odd inches appropriated by the plaintiff, and let it run in a trickling stream by the

opposite shore from the plaintiff's headgate, and below the level of his ditch, by erecting its dam where it is, or would the court have required it to erect its dam below the plaintiff's ditch, and thus protect his right? Can a subsequent appropriator now erect a dam immediately above the defendant's in such a way, should it be possible, as to throw the water it lets go by in another channel of Snake river than that occupied by the defendant's dam, and away from the defendant's headgate, and then contend that because the water is still in the river he had not legally injured the defendant? Has the defendant acquired no vested right in its means of appropriation? Must every appropriator of water in Idaho divine the future, and select such means of diversion that they cannot possibly be injured by any subsequent appropriator who may use such means as he sees fit to perfect his appropriation, regardless of their effect on the prior appropriations? We think that this is a peculiar inversion of the maxim, "first in time, first in right." Is it not rather the law that subsequent appropriators must look backwards, determining the rights or uses of the river as they exist at the time of their appropriations, and so adopt and adapt their means that they do not interfere with existing uses?

We think that the argument of the defendant *(Brief, Certiorari, p. 31)* that the plaintiff was charged with knowledge, back in 1889 when he made his appropriation, that the government and the state might in the future co-operate to irrigate these thousands of acres of lands in just this way is simply absurd. One is presumed to know present law, a part of which is that future law cannot impair rights previously vested, but we learned in school, that history can never be reasoned *a priori*. And even though the plaintiff had the faith of a Twin Falls "Booster", and the eye of a trained irrigation engineer, neither quality prevented him

from acquiring all the rights that he could in the stream as it was in the pioneer days.

*4. Relative importance of parties' rights.*

There is throughout the brief of the defendant, and the opinions of the Circuit Court and Court of Appeals, an assumption that the defendant represents the public interest, and that in some way the plaintiff is a reactionary obstructionist impeding the progress of civilization with a flapping water wheel of early Chaldean architecture. Now we are willing to admit that the defendant is the *Deus ex machina* through whose agency the desert has been made to blossom as the rose—the defendant meanwhile spreading itself as a green bay tree—and that the plaintiff's wheels are an archaism, relics of an age that has passed. But we do not see that this affects the legal aspect of this case in any respect. We contrast the following language of the District Judge:

> "Snake river is one of the largest streams in the country, carrying an immense volume of water through an arid but fertile land, susceptible of the highest cultivation through the use of these waters, and thus of providing homes for thousands of people. Already throughout the great tract of land under the defendant's irrigating system, active towns are springing up; the entire landscape is dotted with the humble abodes of the home builders; everywhere life, vigor and hope prevail, and it is not the mirage of the desert where phantom groves and lakes and palaces delight the eye, but it is the certain progress of a prosperous civilization evolving from past desolation," *(Record, p. 15);*

with the dispassionate utterances of the Supreme Court of Idaho, as against a contention similar to that implied here:

> "It is earnestly urged by counsel for respondents that if this Court should hold that there is error in sustaining the demurrers to the complaints or either of them, it

would result in the depopulation of Shoshone County, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof. Deplorable as this might be if true, it furnishes no excuse for the Court to shirk its responsibilities in disposing the question before us on its merits. The law is no respecter of persons, corporations, or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, be they ever so meager, as well as the capitalist, the corporation or individual, with its or his millions. If the law protects the appellants in their settlement on the public domain of the lands described in the plaintiff's complaint for agricultural or other purposes, then their rights are as sacred and require the same application of the law and the same protection as is guaranteed to every citizen of this great nation and commonwealth. The law does not measure the rights of litigants by the amount involved, nor the manner in which it affects others not parties to the litigation."

*Hill v. Standard Min. Co., 12 Ida. 223.*

Similarly, in *Kirk v. Bartholomew, 3 Ida. 367*, the Supreme Court discountenanced an attempt to distribute water in such a way as to benefit the community as a whole, but in disregard of the iron rule of priority.

Regardless of considerations of public or private importance or benefit, we think that the rights of the plaintiff and defendant in this form of action are equal in quality, and that any right of the plaintiff is to be respected and enforced, though Idaho remain a desert.

The Circuit Court of Appeals, in discussing this phase of the case, simply says that the "right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right. *(Record, p. 31.) Basey v. Gallagher, supra,* and *Fitzpatrick v. Montgomery, 20 Mont. 181,* are cited. But it is assumed that the plaintiff has used

the whole stream, and that such use is unreasonable. We have already dealt with this phase of the case, and have endeavored to show that the plaintiff has used but a small, definitely measurable quantity of the waters of the stream; that for power purposes there has been no consumption of those waters, and that the defendant or any other appropriator was at liberty to make any other form of appropriation than that which was made, or rather, an appropriation by any other means, than those actually employed. We further endeavored to show that the test of reasonableness is conformity to natural conditions, under the doctrine of riparian rights, and necessity, under the doctrine of appropriation, and that the plaintiff's use violates neither test.

But assuming, or admitting—and we are willing to admit—that the advantage to the public resulting from the development of the Twin Falls tract, makes the use of the waters by the defendant in the manner that it has used them, a public use, which the plaintiff's small right should not obstruct, we submit that the power of eminent domain is ample to protect both the public and private interest. The constitution provides:

> "The necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation, or for the right of way for the construction of canals, ditches, flumes or pipes to convey water to the place of use for any useful, beneficial, or necessary purpose, or for drainage * * * or any other use necessary to the complete development of the material resources of the state or for the preservation of the health of its inhabitants, is hereby declared to be a public use. * * * Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, be paid therefor."
>
> *Const. Ida., Art. 1, Sec. 14.*

"* * * Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of those desiring the use of the same, those using the water for domestic purposes shall, (subject to such limitations as shall be prescribed by law) have the preference over those claiming it for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. * * * But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in Section 14 of Article 1, of this Constitution."

*Ib. Art. 15, Sec. 3.*

*Revised Statutes 1887, Sec. 5212,* provides that property already appropriated for a public use may be taken by condemnation proceedings, "But such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated." *Section 5213*: "Before property can be taken, it must appear * * * 3rd. If already appropriated to some public use that the use to which it is to be applied is a more necessary public use."

From these provisions it is clear that if the defendant's use, by destruction of the current or power in the water, is a more necessary public use than that to which the plaintiff was devoting such current or power, the defendant had the right to acquire the plaintiff's right by condemnation proceedings. It seems that these provisions of the Constitution and statutes of Idaho were adopted and enacted with a view to just such a situation as is here presented. Were the plaintiff seeking an injunction, the argument and views of the District Judge would have great weight, but in an action for damages, which in such a case as this is an inverted condemnation proceeding, we believe that they are not to be given the effect accorded to them.

That an injunction and damages are not convertible remedies in a case where the public interest is concerned, see,

*Madison v. Ducktown etc. Co., 113 Tenn. 331; 12 L. R. A. 53.*

We think that a great deal of the plaintiff's argument, and of the opinions of the lower courts, loses its weight when the right of eminent domain is conceded. If one makes a large appropriation of small value, it cannot be destroyed by a subsequent appropriator, but, in a proper case, and if necessary to the development of the natural resources of the state, it may be condemned.

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## CONCLUSION.

We realize that we have prolonged this discussion to a tedious degree. We feel, however, that the case is an important one, and that the opinion of the Circuit Court of Appeals not only denies to our client a substantial and valuable right, but establishes a very dangerous precedent, and one destructive of the basic principles of water law. We felt that this Court realized the importance of the case when it issued a writ of certiorari to bring the record before it, and in our endeavor to throw all the light possible on the questions involved, we have perhaps been too prolix. But we trust that our analysis of the subject has been such that what is elementary, or uncontroverted, may be readily subordinated, and the gist of the controversy become apparent.

To recapitulate, our argument is:

(1) That the right claimed by the plaintiff is a common law riparian right, which, by the laws of Idaho, is good as against everybody but an appropriator.

(2) That the riparian owner may make this right good for all time against all persons, by an appropriation thereof.

(3) That the plaintiff did make a valid appropriation of this right.

(4) Conceding all the foregoing propositions to be unfounded, the right to use the current was incident, or appurtenant, to the appropriation of the water for irrigation.

In closing, we remark, that the development of water law in the western states presents similar features in the different states; there is a marked tendency in the late decisions, even in those which follow the Colorado doctrine of appropriation, to respect riparian rights when it can be done without violence to precedent, and without disavowing the one cherished offspring of the western courts. It is a far cry from *Drake v. Earhart*, with its "phantom of riparian rights," to *Hutchinson v. Watson Slough Co.*, which sustains them, except against the constitutional right of appropriation. The other states show a similar tendency. In those which have been called upon to pass upon the conflicting doctrines late in their history, riparian rights are victorious. It was the pioneer who, to meet pioneer conditions, attempted to totally abolish them, and did so largely succeed in some states. A riparian right is a valuable thing in a settled community to one who made his settlement in reliance upon the enjoyment of that right; courts realize this and are loath to take it away. On the other hand, a riparian right is a bug-bear in the hands of a new comer, "Johnny-come-lately," we call him in Idaho, as against an "old-timer" who has made an appropriation of the water long before there was anyone to be injured, or to claim a riparian right. The two positions represent the two doctrines. In the end, a recognition of riparian rights, at least in the modified form for which we contend here, must prevail.

We submit that the judgments of the Circuit Court, dismissing the action, and of the Circuit Court of Appeals, af-

firming such dismissal, are erroneous, and should be reversed.

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Boise, Idaho, July 1st, 1910.

Office Supreme Court, U. S.
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Clerk

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

MINNIE SCHODDE, as Executrix of the Last Will and Testament of HENRY SCHODDE, Deceased,
Plaintiff in Error,
vs.
TWIN FALLS LAND & WATER COMPANY, a Corporation,
Defendant in Error.

No. 2

On Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

## BRIEF OF DEFENDANT IN ERROR.

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of Counsel.

# In the Supreme Court of the United States.

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Plaintiff in Error,
vs.
TWIN FALLS LAND & WATER COMPANY, A CORPORATION,
Defendant in Error.

**No. 84.**

On Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

## BRIEF OF DEFENDANT IN ERROR.

### STATEMENT OF THE CASE.

The statement of the case made by the plaintiff in error in her brief we deem to be meager and insufficient. There are certain other matters which should be noted in order that the case as it stands in this Court may be properly understood.

It will be noticed that in the first cause of action stated in the complaint in paragraph 13, (Trans. p. 4) there is an attempt to count upon a flooding of an undefined area of land consisting of about "twelve acres" to

"plaintiff's further damage in the sum of twenty-four hundred ($2400) dollars."

To this allegation a special demurrer, allowable under the Code of Idaho, was interposed. This demurrer is contained in subdivisions (a) and (b) of paragraph one of defendant's demurrer. (Trans. p. 12). The demurrer to this portion of the complaint is, without doubt, well taken, and, as noted in the opinion of the Circuit Court of Appeals in its statement of the case (Trans. p. 28) appears to be admitted. At no stage of this litigation has any contention to the contrary been made by plaintiff in error. The only point in controversy is as to the ruling of the lower courts upon the general demurrer. (Plaintiff's Brief, pp. 4, 5).

The facts appearing on the face of the complaint showing the extent of the use made by her testator and his predecessors in interest of the waters of the Snake River and the current thereof, and the use made of the stream by the defendant and which causes the supposed injury, are concisely set forth in the statement of facts made by the Circuit Court of Appeals (Trans. p. 26), from which we quote as follows:

> "Plaintiff's complaint contains three counts. Briefly stated, the cause of action as set out in the three counts of the complaint, is as follows: Plaintiff is the owner of three tracts of land on the banks of Snake River, containing in the aggregate 429.96 acres. Two of these tracts, containing 263.96 acres, are on the south bank and one tract of 160 acres is on the north bank. One of the tracts on the south bank is agricultural land and the other is partly agricultural land and partly

mining ground. The tract of land on the north bank is agricultural. In the year 1889 plaintiff's predecessors in interest and in 1895 the plaintiff himself, appropriated certain quantities of water of the flow of Snake River for use on said lands. In the first count the quantity is stated in cubic feet per second; in the second and third counts the quantities are stated in miner's inches. The aggregate of water appropriated as alleged in the three counts is referred to in the briefs as 1250 miner's inches. Soon after this water was appropriated the parties in interest erected water-wheels in the river to lift the water to a sufficient height for distribution over the land. Nine of these wheels were erected opposite or near the tracts on the south side of the river and two near the tract on the north side of the river. These wheels vary in height from 24 to 34 feet. The parties also constructed wing-dams in the river adjoining or in front of the lands owned by them, for the purpose of confining the flow of the water of the river and raising it at such points above the natural flow of the river, so that the current would drive the water-wheels and cause them to revolve and carry the water in buckets attached to the wheels to a height where it would be emptied into flumes and distributed over the lands by ditches and used thereon to irrigate and cultivate the agricultural land and work the mining ground. It is not alleged in the complaint, but it is assumed that the river at this point runs between high banks and that the water is lifted by the wheels at least 20 feet before it is emptied into the flumes for distribution over plaintiff's lands. In the year 1903, while plaintiff was using the appropriated water of the river upon the described premises, the defendant commenced the construction of a dam across Snake River at a point about nine miles westerly from and below the lands of the plaintiff.

The work was prosecuted on said dam until its completion in March, 1905. This dam is so constructed as to impound all the water of Snake River flowing at said point and to raise the water about forty feet in height. It is alleged that when defendant's dam was filled with water the water was turned into a canal known as the Twin Falls canal, owned by the defendant and located on the north side of the river; that this canal was constructed at a cost, as the plaintiff is informed and believes, of $1,500,000 for the purpose of supplying water for irrigation and domestic purposes to the settlers on about 300,000 acres of arable and arid lands situated below the dam; that for said lands and for a great number of people, being as plaintiff is informed and believes, five thousand in number, there is no other supply available for irrigation, stock, domestic or manufacturing purposes except the water from said canal. It is alleged that by reason of this dam the waters of Snake River have been backed up from said dam and to and beyond plaintiff's premises and have destroyed the current in the river, by means of which plaintiff's water-wheels were driven and made to revolve and raise the water to the elevation required for distribution over plaintiff's lands. It is alleged that it is now impossible for plaintiff to so arrange or change his said dams or water-wheels or flumes, or to build or construct other dams or water-wheels or flumes that will raise any water whatever from said stream that can be used upon the plaintiff's lands, and by reason thereof plaintiff had not been able to irrigate said lands or any part thereof, or to raise profitable crops thereon, or to use the same as pasture lands; and will not, in the future, be able to irrigate said lands or to raise profitable crops or any crops thereon, as long as defendant's dam is maintained; that there is no other supply of

> water available for use upon said lands except the waters of Snke River; that by reason of the backing up of said water and stopping the plaintiff from using said water-wheels to raise the waters of Snake River to and upon said lands and cutting off the water supply from plaintiff's lands, he has been damaged in the aggregate sum of $56,650."

(By some clerical error the complaint, paragraph 13, refers to settlers on "about 300 acres." (Trans. p. 4.) The context shows this to be a misprint, and the opinion of the Circuit Court of Appeals above quoted supplies the correct reading, "300,000 acres." The opinion of Judge Beatty on demurrer also indicates the nature of the correction which should be made. Trans. p. 15. We doubt not this misprint will be corrected at the time of oral argument.)

There are other facts involving the physical characteristics of the Snake River and territory through which it flows which may properly be suggested to the judicial notice of the Court.

The Snake River, one of the great streams of the continent, flows with its tributaries for a thousand miles through four States, and at American Falls, Twin Falls and Shoshone Falls, in the State of Idaho, there are cataracts of great scenic interest. Its course is in great part through the "Snake River plains," a region of lava formation (10 Universal Cyclopaedia 589), in the arid region of Idaho, and its volume is such as to suffice for the irrigation of millions of acres if entirely utilized. It has been measured under the direction of theU. S. Geological Survey, at Montgomery's Ferry, in Idaho,

a few miles distant from the lands involved in this controversy. At this point the river has a drainage area of 22,600 square miles, about one-half the area of the State of New York (Water Supply and Irrigation Papers, U. S. Geological Survey, No 11, p. 99), and the measurements made between 1895 and 1901 show a minimum flow(August, 1901,) of 2115 cubic feet per second, and a maximum flow (June, 1896,) of 39,551 cubic feet per second. (Report State Engineer of Idaho, 1901-2, p. 68; U. S. Geological Survey Report, 1896-7, Part IV, p. 336.) The flow for this one month would cover the entire State of Rhode Island to a depth of three feet, and the total discharge of the river for ten months of the year 1896, as estimated by the Geological Survey, would flood the entire land surface of the State of Maryland to the depth of about one foot.

The importance of the river as a source of irrigation for the great tracts of fertile land through which it flows is further shown in the Report of the State Commissioner of Irrigation of Idaho, 1904, an extract from which is given in the supplement to this brief.

This suit is based, as we shall see, upon the claim of the plaintiff that he had appropriated this vast stream to the irrigation of 422 acres of arid land, and that by such prior appropriation he had precluded the use by the respondent or by any other person, of the Snake River for the irrigation and reclamation of the vast regions lying along its banks, which are susceptible to irrigation only by the waters of this stream.

The size of the river, and the wide disparity existing

between the flood or high water and the low water of each year, together with the character of bed in which it flows combine to render it extremely difficult, from American Falls down to its union with the Columbia, to divert its waters upon the soil. These lower reaches of the river, though traversing great plains of fertile soil, have remained for the most part until very recently unutilized because of the great expense necessary to curbing the flow and diverting the waters from the bed of the stream. Its banks are of lava or basalt, and only by engineering works constructed at great expense could the stream be raised to the level of the abutting lands.

It was upon this part of the river that the plaintiff established himself.

Like hundreds of other settlers engaged in agriculture, stock-raising or mining, he had not the means with which to dam the river so as to bring its level to that of the surrounding lands. Its fall was too slight to permit of the taking out of water through a ditch starting at the grade of the river, as is commonly done upon the upper Snake, for the reason that any such channel must sooner or later run into a wall or layer of basalt, which it is impracticable to cut or tunnel through. Accordingly for decades the great river rolled on through the Snake River plains, leaving them as barren and dusty as though it did not exist, while all over the West, by individual and corporate enterprise, the streams and water courses were being diverted upon lands agriculturally much less valuable. It was apparent to everyone, the plaintiff included, that some day, but only through the agency of public or

private capital, the river would be dammed and the public waters of the State flowing unused to the sea would be diverted to the use for which they were manifestly destined.

The plaintiff, like hundreds of others along the Snake River, had recourse to a method of diversion of water which is simplicity itself, and which has been made use of in Africa and Asia since the dawn of civilization—the current-wheel. Finding it impossible to dam the great stream so as to divert or even curb its flow, plaintiff took advantage of the current of the river by erecting in or at the margin of the stream wheels which, being so placed as to utilize an infinitesimal portion of the flow to turn them, slowly and with more or less uncertainty brought to a higher level a still smaller quantity of the water of the river. The method is primitive, but within certain narrow limits and at certain stages of the river was effectual. The U. S. Department of Agriculture has issued a bulletin (No. 146) upon current wheels, containing numerous descriptions and illustrations of typical wheels, from which we quote in the supplement to this brief.

Plaintiff states in his complaint that at some considerable expense he and his predecessors constructed current wheels which, as we understand the complaint, were capable at a low stage of the river of raising to a sufficient height to be available water for the irrigation of his land. It is stated that the plaintiff and his predecessors built wing dams to divert the flow at low stages of the water to the wheels, bringing the level of water

just above the wheels some three feet higher than it otherwise would have been. The same result would no doubt have been obtained by placing the wheels in the center of the current, or by digging a trench so as to divert the current at low water under the wheels. We see no advantage save only perhaps in the way of successful maintenance of one method of construction over another. The expense and labor is merely a part of that incident to the construction of the current wheels. It is not claimed that the "wing dams" so called diverted the water *from* the channel, but only *in* the channel of the river.

It must be borne in mind that these current wheels of necessity require that the river remain at a constant or nearly constant level for their successful operation. Of course, by building dykes to ward off an excess of water, or by digging a trench or constructing a wing dam in the channel, a greater variation of flow could be utilized. But it is apparent that a level of the river caused through flood or otherwise which would bring the water up too near to the axle of the wheel, or a diminution of flow which would leave too little water to reach the wheel, or be insufficient to turn it, would equally destroy its efficiency. For the operation of the wheel, therefore, the owner must have the stream in its natural condition, or at least the stream must be permitted to flow uninterruptedly with approximately the current and volume which it had at the time the wheel was constructed.

The plaintiff continued to use his wheels for the purpose for which they were constructed until the hap-

pening of the events mentioned in the complaint. There is below him and contiguous to Snake River an immense body of land capable of being watered from the Snake River by the construction of a dam forty feet high and a canal system in connection therewith at a cost of $1,500,000, which system when completed will bring under irrigation 300,000 acres of land. This tract will, with the towns certain to be built thereon, support a population of not less than 25,000. The allegation is explicit that 5000 people are now dependent upon the system for their water supply for all purposes. The dam made necessary by this enterprise, which has been completed, has backed up the waters of Snake River for a distance of some nine miles, to such an extent that at the point where the wheels of plaintiff are situated the current necessary for the operation of the wheels has been stopped. It is apparent from the complaint that the result is one that could not be avoided in carrying out the work necessary to make the water available for irrigation, and no fault is found with the manner in which it has been done.

The statement is made that some assurance was given to the plaintiff during the progress of the work by officers or agents of defendant that the operation of the dam would have no effect upon the wheels or water supply of plaintiff, and that for this reason he made no effort to prevent the construction of the same. The purpose of this allegation is evidently to excuse delay on his part in seeking relief from the Court, and indicates the theory of plaintiff and his counsel that had he begun in time

and upon the equity side of the Court, the construction of the improvement in question would have been enjoined as an interference with his rights in the river.

The complaint here made is not against the defendant for depriving the plaintiff of the water appropriated and used by him upon his land. It is not denied that it still flows in the channel of the river, nor is there alleged any threat or design of the defendant to seek to prevent his taking it from the channel. In fact the charge is that there is more water in the river bed opposite his land than before. Complaint made is that by a disturbance of the natural order of things which prevailed when he made settlement along the banks of the river and constructed his wheels, it has been rendered more difficult for plaintiff to divert from the bed of the stream the water to which he is entitled by appropriation, and, in fact, that it has become impossible for him to divert it by means of the agency which he has heretofore employed.

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**POINTS AND AUTHORITIES.**

1. Each state may determine for itself whether the common law rule in respect to riparian rights or the rule of appropriation shall be enforced as to waters within its boundaries.

*Kansas v. Colorado*, 206 U. S. 46, 94.

2. Generally, the arid States and Territories, Idaho included, have adopted the rule that water may be appropriated for beneficial uses.

Colorado.—*Hammond vs. Rose*, 7 Am. St. Rep. 258.

Arizona.—*Austin vs. Chandler,* 42 Pac. 483.
Idaho.—*Drake vs. Earhart,* 2 Idaho 716.
*Hutchinson vs. Watson Slough Co.,* 101 Pac. 1059;
New Mexico.—*Trambley vs. Luterman,* 27 Pac. 312; *Albuquerque, etc., Co. vs. Gutierrez,* 61 Pac. 357;
Nevada.—*Reno, etc., Co. vs. Stevenson,* 19 Am. St. Rep. 364, 4 L. R. A. 60.
*Walsh vs. Wallace,* 26 Nev., 299, 99 Am. St. Rep. 692;
Utah.—*Cole vs. Richards Irrig. Co.,* 27 Utah 205, 101 Am. St. Rep. 962;
*Morris vs. Bean,* 146 Fed. 431;
Wyoming.—*Willey vs. Decker,* 100 Am. St. Rep. 939.

3. The common law rights of riparian owners and the rights acquired under the doctrine of appropriation are distinct and antagonistic and cannot both be recognized or enforced.

*Clark vs. Nash,* 198 U. S. 361;
*Boquillas Cattle Co. vs. Curtis,* 213 U. S. 339;
*U. S. vs. Rio Grande Dam & Irrig. Co.,* 174 U. S. 690;
*Hutchinson vs. Watson Slough Co.* (Idaho), 101 Pac. 1059;
*Stowell vs. Johnson,* 7 Utah 225.

4. Appropriation involves these several elements:

(a) An intent to apply to some beneficial use.

(b) An actual diversion such as gives physical control of the stream or such part as is appropriated.

(c) An application within a reasonable time to some useful industry.

*Low vs. Rizor,* 25 Or. 551; 37 Pac. 84;
*Black's Pomeroy's Water Rights,* 48-51.

5. The manner of use so far is it affects the quantity of water sought to be appropriated must be reasonable and with due regard to the rights of others. An unreasonable claim of appropriation is a void claim.

*Basey vs. Gallagher,* 20 Wall. 670;
*Atchison vs. Peterson,* 20 Wall. 507;
*Rio Grande Western Ry Co. vs. Telluride P. & T. Co.,* 16 Utah 137;
*Roeder vs. Stein,* 23 Nev. 92, 42 Pac. 867;
*Barnes vs. Sabron,* 10 Nev. 243;
*Nevada Ditch Co. vs. Bennett,* 30 Or. 59, 60 Am. St. Rep. 787;
*Van Camp vs. Emery,* 13 Idaho 202;
*Hough vs. Porter,* 51 Or. 318, 98 Pac. 1083;
*Farmers' Co-op. Ditch Co. vs. Riverside Irrig. Dist.* 16 Idaho 525; 102 Pac. 481.
*Fitzpatrick vs. Montgomery,* 20 Mont. 181, 187.

6. Plaintiff's claim is that the entire Snake River shall be allowed to flow as in a state of nature, with volume and current undiminished.

7. This is tantamount to a claim either that the entire river has been appropriated by the plaintiff for the irrigation of about 420 acres of land, or that independently of any use or appropriation the right so to control the river vests through riparian ownership.

8. This claim which is the basis of plaintiff's asserted cause of action cannot be sustained.

(a) Because the appropriation was for irrigation only and the limit of such appropriation was the amount necessary to irrigate about 430 acres.

(b) Because the current or velocity, being a mere incident or function of the water, cannot be appropriated.

(c) Because except as to the water actually placed upon the lands there was no such diversion as is necessary.

(d) Because an appropriation of the entire stream, if plaintiff's use for the operation of water wheels were to be considered such, would be unreasonable and therefore void. In a legal sense it would not be beneficial.

(e) Because such an appropriation would be void for uncertainty.

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**ARGUMENT.**

The real question which this demurrer raises is, abstractly stated, whether the means or method of diversion is of the essence of the right gained by an appropriation to the extent that whatever may be the method primarily adopted in making effective the appropriation of the water actually consumed, this method and the natural conditions under which only it is effective must under no circumstances be interfered with even though to keep them inviolate the entire stream must be left to the sole use of such appropriator.

Concretely stated, the question presented is as to whether when plaintiff made his appropriation of the water to the extent of some 1250 miner's inches, sufficient for the 420 acres of land, the fact that he chose to make

this water available by employing current wheels instead of other means of diversion vested in him the right to have the stream maintained forever at its natural level and to flow with the same current it had at the date of the installation of said wheels.

Presenting the claim necessarily made by the plaintiff in its simplest form stripped of all disguise it is that no use, however beneficial to the state which controls this river or the public which profits from such use, can be made of this mighty stream which will interfere with either its volume or its current if thereby the wheels be prevented from turning. For it is apparent that in order to turn the wheels there must be both volume of water and some velocity. A diminished volume flowing at the original velocity would be as disastrous to plaintiff as an undiminished volume flowing at a diminished velocity. We are justified, therefore, in saying that plaintiff's claim is that no interference with the volume of the stream by any subsequent appropriator can be tolerated if thereby insufficient water remains to move the wheels. It must necessarily follow that an appropriation so insignificant in extent when compared with the entire flow of the river, by virtue of the fact that it was made effective by means of current wheels has, under the claims of plaintiff, effectually prevented the actual withdrawal of the water of the river in excess of plaintiff's 1250 inches by an appropriation higher up the stream. If, then, the river could be used only for the irrigation and reclamation of lands lying above the plaintiff, such

use being to the injury of plaintiff, the Snake River must forever flow unutilized.

And if, on the other hand, the river could be used only for the Twin Falls tract, under the conditions stated in the complaint, the same result must follow.

To put the case more pointedly, it is contended that plaintiff's testator having chosen to make his appropriation available by means of current wheels which require the continuous flow of the entire river, acquired such rights therein that no subsequent user of water could acquire the right to interfere with the primitive conditions existing when the wheels were installed. This is necessarily the position taken by plaintiff in error however it may be disguised or concealed beneath the specious arguments advanced. It was frankly so stated in the lower court. We quote from the brief of plaintiff in error in the Circuit Court of Appeals, p. 4:

> "When the plaintiff in error went upon the stream as a riparian owner he found the river in a certain condition with its current and its accustomed flow, *and he had a right under the law to utilize the stream in its natural condition and upon the principle that no one could disturb its accustomed flow to the detriment of his appropriation.* The particular manner in which he diverted the water is immaterial in the eye of the law. In other words, when he appropriated the water the act of appropriation included the appropriation of the current to raise that much water."

It would be difficult to conceive a doctrine more at variance with or subversive of the doctrine of appropriation than that above stated. We believe it is not difficult

to show that plaintiff's claim, however stated or urged upon the court, cannot be supported.

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## PRINCIPLES GOVERNING THE APPROPRIATION OF WATER.

### I.

*Each State may determine for itself whether the common law rule in respect to riparian rights or the rule of appropriation shall be enforced as to waters within its boundaries.*

Justice Brewer, speaking for this court in *Kansas vs. Colorado, 206 U. S., 46*, says, page 93:

> "It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." (Citing many cases.)

And again, page 94:

> It (the state) may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the regions of the west of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State. * * * * * *
>
> But when the States of Kansas and Colorado were admitted into the Union they were admitted with the full power of local soverignty which belonged to the other States (Pollard vs. Hagan, 3 How., 212; Shively vs. Bowlby, 152 U. S. 1; Hardin vs. Shedd, 190 U. S. 508, 519), and Colorado by its legislation has recognized this right of appropriating the flowing waters to the purposes of irrigation."

II.

*Generally, the arid States and Territories, Idaho included, have adopted the rule that waters may be appropriated for beneficial uses.*

As to the States, other than Idaho, the rule or doctrine adopted is shown by the cases cited under this point in the former part of this brief.

The rule in Idaho is enforced by constitutional guaranty.

> "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."
>
> *Const. Idaho,* Art. XV., Sec. 3.

> "A riparian proprietor in the State of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream, and is applying it to a beneficial use. To this extent, therefore, the common law doctrine of riparian rights is in conflict with the constitution and statutes of this State, and has been abrogated thereby."
>
> *Hutchinson vs. Watson Slough Ditch Co.* (Idaho), 101 Pac. 1062.

> "A large part of this state is situated in an arid belt, and the appropriation and application of water to a beneficial use becomes one of the most important concerns of the state. Because of this fact the people in adopting the constitution recognized that the public waters of the state should be committed to legislative control, and in so doing declare that the right to divert and appropriate the unappropriated waters of any natural stream to a beneficial use should never be denied. While the legislature is given power to regulate

the manner and method of appropriating and applying to a beneficial use the public waters of the state, they must do so in such manner that the right to divert and appropriate will not be denied."

*Speer vs. Stephenson,* (Idaho) 102 Pac. 365, 367.

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III.

*The common law rights of riparian owners and the rights acquired under the doctrine of appropriation are distinct and antagonistic, and cannot both be recognized or enforced.*

The mere statement of this proposition should be sufficient without extensive citation of authority. The common law rule expressed by the maximum, *aqua currit et debet currere, etc.,* must certainly fall before the preferred doctrine of appropriation which permits the withdrawal from the bed of the stream and the consumption in the beneficial use of irrigation of the last drop—*currere solebat*—which was accustomed to flow.

"Riparian rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common law doctrine of riparian proprietorship. If that had been recognized and applied in this Territory it would still be a desert."

*Stowell vs. Johnson,* 7 Utah 225.

This Court speaking upon the subject says it was

"The obvious purpose of Congress to give its assent, so far as the public lands were concerned, to any system, *although in contravention of the common law rule,* which permitted the appropriation of those waters for legitimate industries."

*United States vs. Rio Grande Dam & Irrig. Co.,* 174 U. S. 706.

And Justice Peckham in discussing the question of the rights of one who has appropriated water for irrigation says:

"The rights of a riparian owner in and to the use of water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil by means of irrigation."

*Clark vs. Nash,* 198 U. S. 370.

The Supreme Court of Idaho, as we have seen in the quotation above made, holds that the riparian proprietor can assert no right superior to those of one who has appropriated or diverted the water flowing through his lands, and that to this extent the common law is in conflict with the Constitution and Statutes of the State and has been abrogated thereby.

*Hutchinson vs. Watson Slough Ditch Co., supra.*

## IV.

*Appropriation involves:*

(a) *An intent to apply to some beneficial use.*

(b) *An actual diversion such as gives physical control of the stream or such part as is within the limits of the appropriation.*

(c) *An application within a reasonable time to some useful industry.*

The foregoing is a fair statement, we believe, of the rule laid down by all authorities:

> "To constitute a valid appropriation of water three elements must always exist: First, an intent to apply it to some beneficial use existing at the time or contemplated in the future; second, *a diversion* from the natural channel by means of a ditch, canal or other structure; and third, an application of it within a reasonable time to some useful industry."
>
> *Low v. Rizor,* 25 Or. 551, citing *Black Pom. Water Rights,* 48-51.
>
> *Sowards v. Meagher,* (Utah) 108 Pac. 1112;
>
> *Ison v. Sturgill,* (Or.) 109 Pac. 580.

In this discussion the most important of the elements above enumerated is *the diversion* of the water. The defendant in error claims that there was at no time a diversion of the entire stream by plaintiff's intestate, and hence no appropriation. There never was any intent to divert the entire stream and hence no right was or ever could be initiated. On the other hand there was an actual diversion by the defendant in error, a diversion alleged to be necessary and reasonable to the beneficial use to which the water was applied and hence an appropriation recognized and guaranteed by law.

The basis of the appropriation of water, the *sine qua non*, the fundamental prerequisite, is diversion. Without diversion of the water, a turning or curbing or other physical control of the waters of a stream, there can be no appropriation. By this we do not mean necessarily that the stream or any part of it must be taken laterally from its natural channel, for a dam for power purposes might be constructed whereby the flowing waters are lifted vertically and allowed to drop through a flume or penstock upon a wheel for the generation of power. But in some manner, by design, and against the operation of natural forces the stream, or some part of it, must be controlled and diverted from its natural course. It must be actual, not constructive or fictitious. This is implied in statutes and constitutional provisions referring to the act of appropriation.

> "The right to *divert* and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."
>
> *Const. Idaho*, Art. XV, Sec. 3.

Laws of Idaho, 1903, p. 223, are explicit on the subject and the diversion of the water as a part of the act of appropriation is constantly referred to.

> "Sec. 1. Before commencing the construction, enlargement or extension or change in the point of diversion, * * * such application must set forth * * * the amount of water to be *diverted* and used. * * * The application shall be accompanied by a plan and map in duplicate of the proposed works for the *diversion* and application of the water to a beneficial use,

showing * * * all other works proposed to be used by them in the *diversion* of the water.

"No one shall be authorized to *divert* for irrigation purposes more than one cubic foot of water per second for each 50 acres."

"Sec. 2. * * * Any applicant * * * may appeal to the District Court of the county in which the point of *diversion* of the proposed appropriation shall be situated."

"Sec. 3. * * * Any person holding any permit for the *diversion* of waters from the same stream."

"Sec. 4. On or before the date set for the completion of works for the *diversion* and application of water. * * * In case of all canals or other works designed to *divert* and carry more than 50 cubic feet. * * * And in the case of works capable of *diverting* on the date set for such completion. * * *"

"Sec. 5. * * * Whether or not they conform to the terms of the application and permit and are capable of *diverting* the amount of water intended, and he shall ascertain how much water such works are capable of *diverting* and conducting. * * *"

"Certificate shall set forth * * * (7) the quantity of water which can be *diverted* by the same and conducted to the place of intended use."

"Sec. 41. All rights to *divert* and use the waters of this State for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this act."

So also the laws of Idaho in force at the time these wheels were placed in the river carry out the same idea.

*Rev. Stats. Idaho,* Secs. 3155 *et. seq.*

"3157. The person entitled to the use may change the place of *diversion* if others are not injured by such change, and may extend the ditch, flume * * *by which* the *diversion* is made."

"3158. The water appropriated may be turned into the channel of another stream * * and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished."

"3160. A person desiring to appropriate water must post a notice * * at the point of intended *diversion,* stating therein:

"1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure, and accurately describing the point of *diversion.*

"2. The purpose for which he claims it, and the place of intended use:

"3. The means by which he intends to *divert* it, and the size of the flume, ditch, pipe or aqueduct in which he intends to *divert* it; a copy of the notice must, within ten days after it is posted, be recorded in the office of the Recorder of the county in which it is posted."

"Sec. 3161. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to *divert* the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain."

"Sec. 3162. By 'completion' is meant conducting the waters to the place of intended use."

"Sec. 3165. All ditches, canals and other works heretofore made, constructed, or provided by means of which the waters of any stream have been *diverted* and applied to any beneficial use, must be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and

not exceeding the quantity claimed, without regard to or compliance with, the requirements of this chapter."

"Sec. 3166. Persons who have heretofore claimed the right to water, and who have not constructed works in which to *divert* it and who have not *diverted* nor applied it to some useful purpose, must, after this Title takes effect, and within ninety days thereafter, proceed as in this Title provided, or their right ceases."

These statutes are merely declaratory of the general law upon the subject which has been enforced by the courts from early days.

The Constitution of Colorado also contains this provision, Article XVI, Sec. 6:

"The right to *divert* unappropriated waters from natural stream to beneficial uses shall never be denied."

The courts and text writers also insist that a diversion in some manner by reducing the waters to possession is an essential feature of an appropriation.

"Plaintiff in error also forgets that it is just as necessary to the creation and preservation of a water right to provide means for the continual *diversion* of the water from its natural channel and for conducting it to the place where it is applied to some beneficial purpose as it is to apply it to the beneficial purpose."

*McPhail v. Forney*, 4 Wyo. 556.

"In addition to the filing of notice and the intention to make the appropriation, there must be *actual diversion* of water from the stream."

*3 Farnham Waters*, Sec. 666.

"We observe first that to constitute a valid appropriation of water, there must be an *actual diversion* of the water from the natural stream or other source of supply, with the intent to apply it to some beneficial use, followed by an actual application of the water to the use designed, or to some other useful purpose, within a reasonable time."

*Long on Irrigation,* Sec. 36.

"The stream as yet flows in its natural course—a part of the realty. The appropriator certainly does not become the owner of the very body of the water until he has acquired control of it in conduits or reservoirs created by art, or applied to the purpose of leading or storing water by artificial means."

*Parks Canal & M. Co. v. Hoyt,* 57 Cal. 46.

" 'Diversion' as applied to a water course means a turning aside or altering the natural course of the stream."

*3 Words and Phrases,* 2142.

So Mr. Kinney:

"No step which it is necessary to take to make the appropriation complete can be constructive. As the whole theory of appropriation for beneficial uses is based merely upon a prior possessory right entirely separate from the property in the land over which it runs, and no possession or exclusive property can be acquired while it is still flowing and remaining in its natural channel or stream, it follows, therefore, that in order to obtain possession of the water attempted to be appropriated, it is an indispensable requisite that

there must be an *actual diversion* of the water from its natural channel into the appropriator's ditch, canal, reservoir or other structure. * * The law of the Pacific States makes it (actual diversion) an absolute necessity in order to acquire an exclusive property in the water."

*Kinney on Irrigation,* Secs. 162 and 159.

See also *Nevada Ditch Co. vs. Bennett,* (Oreg.), 60 Am. St. Rep. 777, to which there is appended a valuable monograph.

"Cutting wild grass produced by the overflow of the river, or, as expressed by the witnesses, by the water of Reese River coming down and spreading over the land, was not an appropriation of that water within the meaning of that term." *Walsh v. Wallace,* 26 Nev. 328.

We cite also the case relied upon by plaintiff in error and cited in her brief, p. 40.

*Idaho P. & T. Co. v. Stephenson,* 101 Pac. 821,

as authority for the doctrine that there must be a substantial interference with the natural flow of the river, and practical control of the same or some definite part of it to constitute a diversion.

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V.

*The manner of use so far as it affects the quantity of water sought to be appropriated must be reasonable and with due regard to the rights of others. An unreasonable claim is an invalid claim. An unreasonable use is not a beneficial use.*

"Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims, and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general conditions of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

*Basey v. Gallagher,* 20 Wall. 683.

See also *Atchison v. Peterson,* 20 Wall. 507.

"This right (to use of water) is not unrestricted, however. It must be exercised within reasonable limits. *Basey v. Gallagher,* 20 Wall. 670. While no mention of dams or reservoirs is made in the law, we are of the opinion that, so far as they may be necessary to the reasonable appropriation and use of such waters, they may be constructed; but as to whether such dams may be raised to the height of 85, 60 or even less a number of feet, we do not deem it necessary in this case to express an opinion. Such dams and reservoirs must be kept within reasonable limits."

*Rio Grande W. R. Co. v. Telluride P. & T. Co.,* 16 Utah 137.

"But whatever he may be irrigating, he is only entitled to the amount he needs, economically and reasonably used, and when he has that he cannot prevent others from using the surplus."

*Roeder v. Stein,* 23 Nev. 96.

"In a dry and arid country like Nevada, where the rains are insufficient to moisten the earth and irrigation becomes necessary for the successful raising of crops, the rights of prior appropriators must be confined to a reasonable and necessary use. The agricultural resources of the State cannot be developed and our valley lands cannot be cultivated without the use of water from the streams to cause the earth to bring forth its precious fruits. No person can by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law, and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. The law, which recognizes the vested rights of prior appropriators, has always confined such rights within reasonable limits."

*Barnes v. Sabron,* 10 Nev. 243.

"In *Simmons v. Winters,* 21 Or. 35, Mr. Justice Lord says: 'The amount of water appropriated must be restricted to the quantity needed for the purpose.' The reason of the rule is, that by nature the water supply is limited in the arid regions, and habitation is dependent upon its use to make the earth yield up its precious metals and the soil to bring forth its fruits in season, hence the restriction of its use to quantities needed for beneficial purposes, as with such husbanding of the supply there is yet not sufficient to meet the increasing demands."

*Nevada Ditch Co. v. Bennett,* 30 Or. 59, 30 Am. St. Rep. 787.

"An excessive diversion of water cannot be regarded as a diversion to beneficial use within the meaning of the constitution. Water in this country is too scarce and consequently too precious to admit of waste. The constitutional rule of distribution 'First come, first served,' does not imply that the prior appropriator may be extravagantly prodigal in dealing with this peculiar bounty of nature. We are aware that it may not be practicable to attain mathematical exactness in measuring the flow of water; but a reasonable approximation to substantial accuracy should be aimed at in determining controversies relating to water supply."

*Combs v. Agricultural Ditch Co.*, 17 Col. 146, 31 Am. St. Rep. 281.

"*Suppression of Wasting Waters.* There is no doubt as to the power of the legislatures of States and Territories to enact laws, as many have done, for controlling and supervising the distribution of water from the streams running within their respective boundaries, and used for the purpose of irrigation, either by appropriators or those claiming the right to the use of the waters by virtue of being riparian owners, and thus preventing parties from causing wastage by diverting more than is actually needed for the purpose for which the appropriation was made. * * * In the early days a prior appropriation was esteemed to cover all water in sight, whether it was needed or not. But the principle of 'beneficial use' as the population increased soon put an end to that conception."

*Kinney on Irrigation*, Sec. 30.

Same. Sec. 166. "So the legislatures of many of the Pacific States and Territories, and the courts of all, soon put an end to these selfish and waste-

ful methods, and the principle of 'beneficial uses' was adopted. Water is too precious an article in the arid region to be permitted to run to waste, and the great weight of modern authorities hold that where a person has diverted a certain portion of the waters of a stream, and permits part of the water, so diverted, to run to waste, or fails to use a certain portion of the water for some beneficial use or purpose, he can only hold that part of the water diverted which has been actually applied to some beneficial use; and his priority only extends to the quantity so used. Also the authorities hold that there was no appropriation as to the water not used, and which ran to waste, but that the same might be subsequently appropriated and held by other parties, provided they took all the proper steps, and they themselves applied it to some beneficial use or purpose. The final test in all cases being whether *all* of the water diverted is actually applied to some useful or beneficial purpose."

"The rule against wastefulness is the chief limitation on the manner of use, as the water must be used for a beneficial purpose. Wastefulness is not countenanced."

*Wiel on Water Rights,* Sec. 127.

"But will it do to say, because in some cases irrigation was had by damming the sloughs, with but little expense and work, causing the large excess of water supply to spread over the premises, that the old methods, which had their origin when there was but little demand for water and its supply correspondingly abundant, may be continued? In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity avail-

able. Van Camp v. Emery, 13 Idaho, 202, 89 Pac. 752. Anderson v. Bassman (C. C.) 140 Fed. 14, 27. The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and no right to such methods of use was acquired thereby."

*Hough v. Porter,* 51 Or. 318, 98 Pac. 1083, 1102.

"In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application."

*Van Camp v. Emery,* 13 Idaho 202.

"In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use and application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not ade-

quately prepared for the economical application of water."

*Farmers Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525.

"The use of water in this State is declared by the Constitution to be a public use. Const. Art. 3, Sec. 15. It is easy to see that, if persons by appropriating the waters of the streams of the State become the absolute owners of the water without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the State. The tendency and spirit of legislation and adjudication of the northwestern States and Territories have been to prevent such a monopoly of the waters of this large section of the country.

*Fitzpatrick v. Montgomery*, 20 Mont. 181.

**Tested by the Rules Governing Appropriators and Riparian Owners Plaintiff in Error has no Right to the Current or Full Volume of the River as Against any Person Using or Diverting it for a Beneficial Purpose.**

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I.

*Plaintiff's claim is that the entire Snake River shall be allowed to flow as in a State of nature with volume and current undiminished.*

We have heretofore called attention to the sweeping character of plaintiff's demands. If the current wheels established at an early day by the plaintiff were adapted to conditions as they then existed, they would be interfered with by any appropriation or consumption of a sub-

stantial quantity of the water by an appropriator above him. Such interference, upon the theory advanced would be an invasion of plaintiff's rights as serious as though the current were stopped by a dam below the wheels. It follows, therefore, that the river must continue to flow as in a state of nature, unchanged in any respect.

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II.

*The claim as made is tantamount to a claim that either through riparian ownership or through an appropriation for the irrigation of about 420 acres of land, ownership or right of control of the entire river is vested in the plaintiff.*

By hypothesis the current wheels were so established as to demand the flow of the river in its natural state. Since, as claimed, the plaintiff's testator acquired the right to the use of both volume and current, he acquired the full beneficial ownership and control of Snake River. We can conceive of but two methods by which this can have been accomplished,—either through riparian ownership or under the doctrine of appropriation. As to whether it be possible under either rule we shall have occasion to discuss later. We call attention at this time to the fact that this riparian owner, holding a few acres of land upon its bank has, if his demands be granted, an ownership of these public waters of the State of Idaho as absolute and unrelenting as though they were confirmed to him by patent. And this notwithstanding the provisions of Article XV, of the Constitution of Idaho.

III.

*This claim which is the basis of the cause of action asserted against defendant cannot be sustained. It is invalid for several reasons.*

(a) Because the appropriation was for irrigation purposes of an amount sufficient to irrigate about 420 acres of land, and this was the limit of appropriation.

There is no express allegation in the complaint of any attempt or intent to appropriate more than would suffice for the quantity of land described in the complaint. Surely in a matter so important as this there should be some clear indication of the purpose of the appropriator to take and use the entire stream. Instead we find (Trans. p. 2) that for one parcel there was an appropriation of "fifty second feet of the flow of said Snake River," for another parcel there was an appropriation of "600 miner's inches measured under a four-inch pressure of the flow, etc." (Trans. p. 5), and for the third parcel there was in like manner an appropriation of "400 inches of the flow of the waters, etc." (Trans. p. 6). In each case it is carefully stated that the water was so appropriated "for use on said land."

As to all the water of the river over and above the inconsiderable amounts above mentioned there was no express appropriation so far as we are informed.

(b) Because the current or velocity being a mere incident or function of the stream was not appropriated and could not be appropriated otherwise than by appropriating the entire stream.

As we understand the claim of plaintiff in error and the argument in support of it, there is an express appropriation of a definite amount of water of the flow of the river, and there is in addition a vague claim of appropriation of the current of the river for the purpose of raising this water to the required height above the river level. There seems to be no distinct claim that the entire river was appropriated for this purpose, but rather a hint or claim of an appropriation of the *current* of the stream. It is of the nature of a usufruct of the river rather than the river itself. We confess our inability to understand the principle upon which this is based. We can appreciate a claim, under the doctrine of appropriation, to the beneficial use of a quantity of water. The use may consist in the consumption of the water as by irrigation, or it may consist in the mere control of the flow through a given distance, within which its natural fall contributes power. The water is then returned to its channel substantially undiminished in quantity. As we have seen, this involves the actual diversion and caption of the stream.

But according to the contention of plaintiff in error we have here a *tertium quid*, a nondescript, which is not an appropriation, but yet a right based upon actual beneficial use, arising not from riparian ownership, but from acts performed and structures erected.

We look in vain for any claim that there was an appropriation of the stream as a source of power with which to utilize the appropriation of water for irrigation. No such argument is advanced. There is no allegation in

the complaint to support it. We are forced to believe, if plaintiff's position be sound, that in some undefined manner the current, the velocity-quantity of the water, as distinguished from the water itself has been acquired. We cannot consent to this. It is as unreasonable and as intangible as would be the claim of a land-owner to the shade of trees standing wholly upon his neighbor's premises.

Plaintiff in error, as we believe, is driven either to a claim of appropriation of the water itself or to a claim founded upon the rights of a riparian owner. There can be no claim founded merely upon the current, disassociated from the water of which it is an incident or function.

(c) Because excepting as to the water actually placed upon the lands, there was no such diversion as is necessary to an appropriation.

We have shown that diversion is one of the primary requisites of an appropriation, and that this diversion must be actual and not constructive. We have seen that in the case of plaintiff's testator, there was no diversion or intent to divert, hence no appropriation or intent to appropriate.

There was never any actual physical control of the river or any definite portion of it. It was not brought out of its channel, or confined within it, or curbed or brought under the dominion of the plaintiff's testator. We believe we are safe in saying that no instance can be found of an appropriation where there has not been some interference with natural conditions. The wing dams spoken of

which merely deflected the current from one side of the bed of the stream to the other, but brought no portion of the water outside the bed of the stream, can no more be regarded as an actual control of the stream itself than the shots and shouts of a hunter which turns a wild deer on the mountain from his accustomed course can be regarded as a capture of the deer.

(d) Because it lacks certainty or definiteness.

Assuming that in some manner an appropriation has been made not only of the 1250 inches of water necessary for the irrigation of the lands and the mining operations, but for water to raise this quantity out of the bed of the stream to the level of the lands to which it is applied, such additional claim must be held void for uncertainty. When the river is at its spring flood, the volume great and the current very rapid, it is manifest that very much less water will be required than when the current is sluggish and the water low. Since the wheels use only the uppermost layer or surface of the stream, the waters beneath serve no purpose except as a foundation upon which the operative portion of the flow is to rest. How much of the stream is appropriated for the use of the wheels no one can say. How many cubic feet of water must flow in the river at any time in order that the small portion may do work for plaintiff's wheels no one can say. Since the river cannot be interfered with, but must be permitted to flow as in the natural state, this quantity thus monopolized must be indefinite and uncertain in amount, always changing. Such uncertainty is fatal to a

valid right by appropriation however it may be under the doctrine of riparian right.

(e) Because, such use of the stream, if it can be regarded as an appropriation, would be wasteful, extravagant and unreasonable. It would not be in law beneficial, and therefore void.

Assuming, for the purposes of this discussion, that the use under these conditions of the extra flow of Snake River might be regarded as an attempted appropriation of the river, it would still be void as unreasonable and an unpermissible encroachment upon the rights of the public. It would be so wasteful and extravagant as to be void upon its face.

It would seem that no argument upon this point is necessary. No one man, no matter when he may have done the work by which he expected to acquire the right to the entire river, can aggregate to his own use what is adequate for the needs of thousands. The use to which under plaintiff's claim the river is being put is so trivial, so inadequate, as to be in no proper sense beneficial.

If we could imagine an appropriation of the entire flow of the Snake River for the purpose of irrigating a 160-acre farm, the water being diverted from its channel into a porous, wasteful canal, which permitted only an infinitesimal amount of water to reach the irrigable lands, a court would have no hestitation in declaring the appropriation void because of the wasteful method of diversion and application. And this would unhesitatingly be done whatever the regularity of the proceedings taken or the undisputed priority of use.

In the case at bar an entire river is claimed as against the public represented by the defendant. Of the river flow some 1250 inches is used upon the lands, and the remainder, sufficient to irrigate and reclaim 300,000 acres, is not used except to raise the 1250 inches to the level of some 25 feet. The lower Court has rightfully said that this cannot be done. It is a waste which no one may make under the protection of law.

THE RIGHTS OF DEFENDANT IN ERROR ARE VALID, RESTING UPON THE DOCTRINE OF APPROPRIATION FOR A BENEFICIAL USE.

We have seen that the use to which defendant in error is putting the stream is the very highest to which water can be put in the arid region. It is for the reclamation of land, the furnishing of water for domestic purposes and for power. It includes everything from the support of life to the least considered beneficial use, that for power purposes. The work which defendant in error has done and is doing constitutes one of the steps essential to a valid appropriation, and by the Constitution and laws of Idaho the right thus to appropriate shall never be denied. Rev. Codes, Sec. 3240.

True, the complaint does not on its face indicate that *all* the steps necessary to a complete legal appropriation had been taken at the date of suit, but they are not negatived. Only the state which controls the public waters within the boundaries may complain of any possible irregularity in the method or order of the steps taken. The actual use may even precede the formal act of appro-

priation which consists of filing a written notice. Doubtless under the laws the defendant in error might lose to some other appropriator its priority of right if this formal notice of appropriation by written notice he neglected.

But plaintiff in error in her brief has conceded that the order in which the steps are taken is immaterial. It is the use for a beneficial purpose which gives the right, and the posting or filing of the notice which fixes the inception of the right under the doctrine of relation.

See Plaintiff's Brief and Cases Cited, p. 37.
Ison v. Sturgill (Or.), 109 Pac. 580.

We may at this point call attention to the statement in plaintiff's brief, p. 26, as follows:

> "In other words, by showing that Schodde is a riparian proprietor, we have made a *prima facie* case, which the defendant can only overcome, if at all, by showing it is an appropriator, which has not yet been done."

If by this is meant that the allegations of the complaint fail to show a right initiated by the defendant under the sanction of the Constitution and laws of the State of Idaho, we think the position not well taken, as shown above. If it be meant that the doctrine of appropriation cannot overcome or take away Schodde's rights acquired under the rule of riparian rights, we insist that there are no such rights in Idaho where the water is needed and is reasonably taken for actual consumption and use under appropriation.

THE DOCTRINE OF RIPARIAN RIGHTS AS KNOWN AT COMMON LAW AFFORDS NO BASIS FOR THE SUPPOSED RIGHTS OF PLAINTIFF IN ERROR.

We submit that properly considered the complaint in this action attempts to state a cause of action which consists of a supposed invasion of rights held by the plaintiff's testator under the right of appropriation, not under the common law rule of riparian rights. It is a right or title based upon statute which is set forth. Perhaps it was not necessary for the pleader to set forth with particularity the source of title or the character of the possession held. But having done so, we insist that at this late date the position deliberately taken cannot be changed. We do not know to what extent this court will care to go to discover the theory upon which plaintiff has prosecuted the suit to this point, but we do call attention to the situation in the Circuit Court of Appeals, as shown by the opinion of that court, Record p. 28.

> "It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location and that the means of utilizing the current is attached as an appurtenance to the appropriation."

But, independently of any question of pleading or any estoppel growing out of the claims heretofore made, the claim now expressly set up by plaintiff in error under the common law rule cannot be maintained.

The recapitulation of plaintiff's argument is found upon pp. 62 and 63 of the brief.

As we understand the position there stated it is substantially that there is an imperfect or inchoate right to

the water growing out of riparian ownership, which right was "made good" bv appropriation.

We do not understand that the common law rights of riparian ownership require the exercise of diligence in maintaining them or putting them into active use. We do not understand that these rights require the aid of the doctrine of appropriation, whether that doctrine be regarded as founded upon statute or local custom. If, as we have argued, the two rules or systems are antagonistic and mutually destructive, we fail to see how the riparian right can be helped or made good or established by a right of appropriation. *A fortiori* this is so if the supposed appropriation be void, as we believe we have shown this to be.

*Van Camp v. Emery,* 13 Idaho 202, cited in this brief, and cited by plaintiff, p. 39, is an authority upon this point. A riparian proprietor might as such have the right to dam or otherwise interfere with the stream *until an appropriator is injured.* Then the dam or other obstruction, the current wheels or what not, must come out. If, however, by the use of the dam or obstruction the current wheel, the ram or other device may initiate a certain right, this right is certainly not to the maintenance of the thing inhibited, but to the use of so much water as was used and as to which a right was initiated.

In this case the current wheels have served to initiate the right to some 1250 inches of water *and to nothing else.* This we have never denied.

*But even if we were to concede the application in the State of Idaho of the common law rule as to riparian rights, plaintiff's claim must fail because, under the circumstances, it is unreasonable.*

The right of a riparian proprietor at common law is not unlimited. It must be reasonable. The maxim, *sic utere tuo*, etc., is constantly invoked.

*2 Farnham on Waters*, Secs. 465-6.
*Baltimore v. Appold*, 42 Md. 442.
*Howard v. Ingersoll*, 13 How. 426.
*Union M. & M. Co. v. Ferris*, 24 Fed. Cas. 601.
*Crawford Co. v. Hall* (Neb.), 60 L. R. A. 902.

And since the use of the Snake River by the defendant is for the benefit of the lands contiguous to the river below plaintiff's wheels, just as the use by the Government on the Minidoka project is for the benefit of lands above the wheels, the most that can be claimed for plaintiff in behalf of the current wheels is just and reasonable use of the river in common with other riparian proprietors, and not an exclusive use.

*Clark v. Allaman*, 71 Kan. 206.

Cited at length by this court in *Kansas v. Colorado*, 206 U. S. 102-105.

We do not deem it necessary to refer to the argument that defendant in error demands recognition of its rights as against those of plaintiff by reason of the magnitude of its undertaking or the benefits to the state at large. This we submit is not a fair interpretation either of the opinion of the lower court or of our position. The

magnitude of the benefits conferred by defendant's utilization of the waters of Snake River is dwelt upon only to show the unreasonableness of plaintiff's claims, and that he must have known from the very first that the current he was using must of necessity be destroyed when, in time, the river should be put to its proper use.

It is respectfully submitted that the case should be affirmed.

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# SUPPLEMENT.

**From the Report of the Commissioner of Immigration, Idaho, 1904.**

The southern district depends chiefly upon its water supply for irrigation and power for the development of its resources. The Snake River is the main artery of this great section of country, which is 250 miles long and 100 miles wide. The North Fork of this river rises in Henry Lake, which is located near the state line between Idaho and Montana, near the northeast corner of Fremont County, and also in Great Springs, located about fifteen miles southeast of Henry's Lake and from which flows a great river of pure, cold mountain water. The South Fork rises in Jackson's Lake, in Wyoming, just south of the Yellowstone National Park. These two streams receive the water from numerous tributaries and unite in the southern part of Fremont County, forming the Snake River proper, the largest river in Idaho. The general course of the stream from this point of confluence is southwesterly for a distance of 150 miles, crossing Bingham County into Oneida County to a short distance below the American Falls, where the direction turns nearly west. From its source to the American Falls, the banks of the river are generally low and the fall is rapid, permitting of easy construction of irrigation canals to cover the great benches of fertile lands that border the stream through this section. At American Falls the banks be-

come higher, more abrupt and rocky, the formation being principally basaltic, and in many places the river seems to cut its way through walls of solid rock. This condition obtains for about 100 miles below American Falls to a point near Milner, in Cassia County, where the river, with a great rush and flurry, enters a veritable canyon with precipitous walls of basaltic rock on either side. Some thirty miles below Milner the river makes a drop of 134 feet at what is known as Twin Falls. At this point an island has been formed on the very brink of the precipice, which divides the channel of the river into two parts, forming two nearly equal falls, from which it derives its name.

Four and one-half miles further down is the famous Shoshone Falls, with a drop of 210 feet. Eleven miles more and another drop of 139 feet is known as the Augur Falls. Within a distance of fifteen miles this great river makes a straight drop of 583 feet, creating the greatest natural water power in the United States. . . . .

The principal tributaries that flow from the north into the Snake River are the Wood, Boise, Payette and Weiser Rivers. The Port Neuf, Raft, Salmon Falls, Bruneau and Owyhee Rivers are tributaries from the south. In Fremont and Bingham Counties, along the headwaters of this river and along its tributaries in other parts of this district, are found great tracts of fertile valley lands that have been largely covered by irrigation canals, and the lands are generally settled and a large portion are in a high state of cultivation. In the interior of this great valley, located between the tributaries, both on the north

and the south sides of the river, are found large tracts of high bench lands that are proving to be exceedingly fertile and productive. To the naturally rich mountain soil that is found in all this region has been added a liberal deposit of volcanic ash and decomposed basaltic formation, which was deposited to a greater or less depth in all parts of this great valley during the volcanic disturbance that has visited this region. Scientific agriculturists assert that soils formed by a combination of volcanic ash and natural earth deposits contain the greatest amount of plant food, and will produce a great quantity of vegetable growth without refertilizing. The Island of Java is said by expert agriculturists to be the richest and most productive body of land in the world. This island, which has eleven active volcanoes, supports a population of 26,000,000 people, though its area is not so great as the State of Idaho and its area of cultivated lands is no greater than the area of lands subject to irrigation in the Snake River Valley of Southern Idaho. It is these tracts of fertile lands located in this section of the State that have attracted the attention of the reclamation service of the United States, and when the lands now withdrawn from the entry by the government have been supplied with water for irrigation, together with the 2,108,000 acres that are already covered by the canals of Southern Idaho, no State in the Union will contain so large an area of irrigated land, and the products of Idaho soil will contribute largely to the support of the Nation.

U. S. Department of Agriculture.
Office of Experiment Stations, Bulletin No. 146.
*Current Wheels.*
Washington, D. C., May 10, 1904.

Sir:—I have the honor to submit herewith a report describing a large number of current wheels in use in the arid West and in Italy.

Current wheels are often the cheapest means of raising small volumes of water short distances where much larger volumes are flowing by. A wheel can lift only a small percentage of the water passing it, and the cost of construction increases so rapidly with increased size that the large wheels necessary for high lifts can not be profitably built. But there are many places along streams and the upper section of canals where enough water for a few acres can be lifted a few feet with almost no cash outlay and without injury to the lower users, except for the small quantity of water taken.

The great advantage of current wheels is their extreme cheapness of construction and operation where conditions are favorable. A farmer of ordinary ingenuity, having a few tools, can usually build a wheel, principally from materials which are lying around his buildings, with little or no cash outlay. If the wheel is well built, the cost of operation will be limited to the purchase of oil and the making of repairs. However, the obtaining of the best results depends upon the observance of correct principles in the construction of the wheels, but the following of these principles involves no increased expense. The report herewith submitted contains a discussion of the theory of

current wheels and descriptions, photographs, and drawings of a large number of wheels now in use, with discussions which bring out their good and bad features. . .

Respectfully submitted,

ELWOOD MEAD,

Chief of Irrigation Investigations.

A. C. TRUE, Director.

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## CONSTRUCTION OF CURRENT WHEELS.

The practical experience of many irrigators in the construction and use of current wheels has been collected and is here presented as an answer to inquiries regarding their cost and efficiency.

In its simplest form a current wheel consists of a large skeleton roller made of wood, with paddles projecting beyond its rim. It is hung on a shaft and supported at both ends by piers or posts, so as to allow the wheel to dip into the water to the width of the paddles. The simplest device for raising water with such a wheel is a row of buckets placed on the rim so as to fill at the bottom of the wheel and empty into a trough near the top. . . .

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## THEORY OF POWER IN CURRENT WHEELS.

While a home-made undershot water wheel develops but little of the power in a running stream, still the action of the crudest wheel is governed by certain principles, an understanding of which will aid the builder in improving the design of his wheel, thereby increasing its efficiency.

Current wheels, unlike overshot wheels, do not act by the weight of the water, but by the impulse of dynamic pressure of moving water. The power contained in running water is expressed in terms of the distance through which the water would have to fall in order to obtain the velocity observed. This distance is called the velocity head. A body falling freely four feet attains a velocity of sixteen feet per second. Hence water flowing sixteen feet per second has a velocity head of four feet; in other words, if an inclined plane were placed in such a stream, the water would run up it to the height of four feet before coming to rest. Thus the power contained in 1000 pounds of water running sixteen feet per second is exactly sufficient to raise a weight of 1000 pounds four feet. This weight in streams is from one to four feet per second, representing velocity heads of from one-fourth inch to three inches, so that some means other than an inclined plane must be used to raise water to a serviceable level. In any case work is performed only when the motion of the water is checked. The current wheel, by checking the motion of a large quantity of water to some degree, raises a very small quantity of water to a height of ten or a hundred times as great as the velocity head in the stream.